(22,234.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 329.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, CHARLES HEATH HEYL, JR., AND DELPHINE TURNER HEYL, BY THEIR NEXT FRIEND, CHARLES H. HEYL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page
Caption	1
Transcript from supreme court of the District of Columbia	1
Caption	1
Bill of complaint	1
Answer of Lewis E. Smoot	7
Stipulation as to answer	9
Joinder of issue	10
Testimony on behalf of complainants	10
Testimony of James P. Perry	10
"Exhibit C. H. D. No. 1"—Sketch showing foundation and elevation	12
Testimony of Snowden Ashford	14
Letter from Samuel Maddox to Edward H. Thomas, Esq	15
Letter from E. H. Thomas to Snowden Ashford	16
Letter from Jos. E. Willard to L. E. Smoot	16
Permit to erect terrace	17
Certificate of approval of plan	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1911.

Page

Permit to build dwelling 18
Certificate as to permission to erect frame office 18
Letter from L. E. Smoot to Snowden Ashford as to amendment of permit to build 19
Letter from S. Ashford to L. E. Smoot relative to change of plan 19
Letter from A. M. Poynton to L. E. Smoot relative to foundations and position of party wall 20
Exhibit C. H. D. No. 2—Plat of survey of location of house 25
Testimony of James T. Wilson 25
Charles H. Heyl 28
Charles H. Heyl (recalled) 34
Opinion of Justice Wright 36
Final decree 37
Appeal and penalty of bond fixed, to act as a supersedeas 37
Appeal bond (supersedeas) filed 37
Time in which to file transcript of record in Court of Appeals extended. 38
Directions to clerk for preparation of transcript of record 38
Clerk's certificate 38
Stipulation for addition to record 39
Minute entry of argument 39
Opinion 40
Decree 43
Petition to modify decree 43
Order denying motion to modify decree 45
Petition for appeal 45
Affidavit of Thos. J. D. Fuller 46
Edgar S. Kennedy 48
Wm. A. Hill 49
Lewis E. Smoot 50
Order denying motion for appeal 51
Petition to Mr. Justice Day for appeal 53
Allowance of appeal 53
Assignment of errors 53
Bond on appeal 54
Citation and service 55
Clerk's certificate 56

In the Court of Appeals of the District of Columbia.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL et al.

a Supreme Court of the District of Columbia.

In Equity. No. 25945.

JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, Infants, by Charles H. Heyl, Their Next Friend, Complainants,
vs.
LEWIS E. SMOOT, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Bill.*

Filed January 10, 1906.

In the Supreme Court of the District of Columbia.

In Equity. No. 25945.

JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, Infants, by Charles H. Heyl, Their Next Friend, Complainants,
vs.
LEWIS E. SMOOT, Defendant.

The bill of complaint of the above-named infants, Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by Charles H. Heyl, their next friend, respectfully shows to the Court:

1. That they are infants under twenty-one years of age, and reside with said Charles H. Heyl, their father, who is a citizen of the United States, commorant in said District. They bring this suit in their own right.

2. That said Lewis E. Smoot is a citizen of the United States, resident in said District, and is sued in his own right.

3. That your complainants are seized and possessed in fee simple absolute of the following described real estate, situate and being in the said District, in that portion thereof commonly known as the "County of Washington," viz: part of lot or square num-
2 bered two (2) shown on plat recorded in Liber County No. 11, folio 41, of the Records of the Office of the Surveyor of said District, contained within the following metes and bounds: Beginning for the same at a point on the north line of Wyoming Avenue, one hundred and twelve (112) feet and fifty-five hundredths (55/100) of a foot west from the intersection of said north line of Wyoming Avenue with the west line of Twentieth street, and running thence east on said line of said Avenue, twelve (12) feet and fifty-five hundredths (55/100) of a foot; thence north parallel with Twentieth street, one hundred and thirty (130) feet; thence west parallel with Wyoming Avenue, twelve (12) feet and fifty-five hundredths (55/100) of a foot; and thence south parallel with Twentieth street, one hundred and thirty (130) feet to the place of beginning.

Also part of lot numbered two (2) in the subdivision made by the heirs of Loveday Pairo of part of lot numbered four (4) of Anthony Holmead's heirs and devisees' subdivision of part of the tract of land known as "The Widow's Mite," as per plat of said Pairo's heirs subdivision recorded in Liber R. M. H. No. 21, folio 386, of the Land Records of said District, beginning for the same at a point on Garfield (now Wyoming) Avenue, eighty (80) feet east of the southwest corner of said lot and running thence northerly at right angles to said Avenue, one hundred and sixty-two (162) feet; thence easterly fifty (50) feet; thence southerly one hundred and sixty-two (162) feet to said Wyoming Avenue, and thence west along said Avenue fifty (50) feet to the beginning.

That said property is improved by a large and spacious
3 dwelling house, known as premises No. 2009 Wyoming Avenue, containing about fourteen rooms, and is occupied by your complainants and their father as a home. That said property is of great value, to wit, $45,000., and is one of the most comfortable dwellings in that vicinity.

4. That in the construction of said dwelling house upon said property the same was so placed thereon as to leave an open space on the east side thereof about thirty-two (32) feet wide, and running the full depth of complainants' property, which open space was sown in grass and ornamented with shrubbery, and was designed to furnish light and air to said dwelling, as well as to add to the beauty and comfort of said home.

Along the eastern boundary line of said lot, and about nine (9) inches inside thereof, a hedge was planted on the property of your

complainants, which hedge now remains, except as hereinafter shown, and complainants further show that similar hedges are maintained on other lots adjoining theirs on the west, such hedges being a feature of the block and greatly admired.

5. That the said defendant claims to be the owner in fee simple of the lot next adjoining on the east, being west fifty (50) feet front on Wyoming Avenue by the full depth of lot one (1) which depth is one hundred and thirty (130) feet, in George Truesdell's subdivision of part of the tract of land known as "Widow's Mite," in the County of Washington, said District, as said subdivision is recorded in Liber County No. 12, at folio 65, of the Records of the Office of the Surveyor of said District.

4 6. That the defendant is now constructing upon his said lot a dwelling with the front wall thereof set back about forty (40) feet from the front line of the lot and the west wall thereof on his own land and set back about three feet from the west line of his said lot, the same being the eastern boundary of complainants' land, except that about five (5) feet back from the front wall of said house the defendant has caused a bay-window to be projected out from the west wall to and over the dividing line of said properties, which said bay-window is about eight (8) feet wide. The foundation walls of said bay-window have been laid and the window partially erected, and your complainant is advised that said defendant intends to forthwith proceed with the further construction thereof to a height of about twelve (12) feet.

7. That the defendant pretends that he has the right to construct said bay-window under the provision of section 62 of the Building Regulations of the District of Columbia, which provides as follows:

"That the person or persons appointed by the Commissioners to superintend buildings may enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of

5 such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall, the charge of value thereof to be set by the person or persons so appointed by the Commissioners."

He therefore procured the Surveyor of said District, against the protest of your complainants, to enter upon their said land, and set out the foundations of the intended west line of said bay-window equally upon the lands of your complainants and the defendant's own land, upon the pretext that said proposed wall, eight feet long and twelve feet high, forming the back of said projected bay-window, was a "party wall," and your complainants further show that preparatory to digging the foundation of said last-mentioned wall, the defendants ruthlessly and unnecessarily destroyed the aforementioned hedge along and near the eastern boundary line of their said lot for a distance of about twelve (12) feet, removed the flowers

therefrom, and otherwise greatly damaged and injured their said property. The said proposed wall, forming as aforesaid the back of said projected bay-window, is eighteen inches thick at the bottom, and is intended to be thirteen inches thick from near the surface of the ground to the top of the wall.

8. Your complainants are advised by counsel, and therefore charge, that said section 62 of the Building Regulations is practically identical with the provision for the regulation of buildings in the Federal City, promulgated by President Washington on the
6 17th day of October, A. D. 1791. Said promulgation purported to be, and was, issued under and by virtue of a grant of power contained in the conveyances from the original proprietors of lands to Commissioners appointed to lay out the Federal City, which declared that the lands so conveyed were subject to "such terms and conditions as shall be thought reasonable by the President, for the time being, for regulating the materials and manner of the buildings and improvements on the lots generally in said City, or in particular streets or parts thereof, for common convenience, safety or order; provided such terms and conditions were declared before the sale of any of the said lots," etc.

Under and by virtue of this grant of power President Washington promulgated certain building regulations, before any sale of the lots conveyed as aforesaid was made, providing that certain named persons might enter upon the lands of any person and "regulate the walls to be built between party and party, as to the breadth and thickness thereof, which said foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built." Thereupon all lands lying within the limits of the Federal City became and were subject to this regulation, so as aforesaid established, and so continue to the present time. But in this connection these complainants show that their said lands were not within the limits of the Federal City, as laid out by the said Commissioners, and are in no way subject to the building regulations so promulgated by President Washington, but to the contrary thereof are entirely free from any right or easement on the
7 part of an adjoining owner of lands to enter thereupon for the purpose of laying out a "party wall" as defined in the building regulations now in force in the District of Columbia.

9. Your complainants further allege and show that under and by virtue of an Act of Congress, approved on the 14th day of June, 1878, authorizing the Commissioners of the District of Columbia to make and enforce such building regulations for said District as they might deem advisable, the said Commissioners have from time to time promulgated certain building regulations for said District, among them being said section 62. But these complainants are informed that said Commissioners do not attempt to enforce the provisions of said section in respect of party walls beyond the limits of the Federal City as originally planned, or to lay out or establish party walls in what, as before shown, has come to be known as the "County of Washington."

And your complainants further show in this connection, upon information and belief, that the defendant on or about the 9th day of September, 1905, made application to the Inspector of Buildings for

said District for a permit to erect said dwelling house to be known as No. 2007 Wyoming Avenue, and in said application stated that there were to be no party walls in said dwelling. That thereafter, on or about the 14th day of September, 1905, said defendant, by a letter to said Inspector of Buildings, sought to amend his said permit by including therein said wall eight feet long, nineteen inches wide at the base, and thirteen inches wide from the ground up as a "party wall."

That in response to said letter said defendant was advised
8 by said Inspector of Buildings that, if he, said defendant, located said wall as a "party wall" equally upon the lands of your complainants and the defendant, he, said defendant, must do so on his own responsibility and without authority from the office of said Inspector of Buildings so to do.

10. Your complainants are further advised, and therefore aver, that said section 62 was never intended to have any force or effect outside of the territorial limits of the City of Washington and was never intended to apply to lands lying in the County of Washington, in said District; and that, if it was intended to have such force, effect and application, the said regulation is unconstitutional and void because its effect is to deprive your complainants of their property without due process of law and just compensation.

11. And your complainants are further advised that, even if the said building regulation in respect of the location and construction of party walls applies to lands lying without the territorial limits of the City of Washington nevertheless the said projected wall, so as aforesaid now being erected in part upon land belonging to these complainants, is in no sense a party wall as defined in said regulations. The back of said window is connected with the west wall of defendant's house with bits of wall built on a "splay," as it is known in builders' language, that is, it is not constructed at right angles with said west wall. Wherefore it could not be utilized by these complainants in connection with any building on their lot without an added expense due to the need of cutting out the corners on
9 complainants' land; and, in addition to being unsightly, is of no practical use to these complainants for any of the purposes of a party wall.

12. And these complainants further show that the hedge growing on the lands of these complainants, and so as aforesaid destroyed by the defendant, was so destroyed during the absence from said District of the said Charles H. Heyl, the father and next friend of these complainants. The said hedge was what is known as California Privet, a hardy plant that with a little care might have been dug up, preserved and replanted after the building operations of the defendant were completed. But the defendant, utterly unmindful of the rights of these complainants in the premises, and without right in that behalf, as hereinbefore shown, himself or by his agents, servants and workmen, entered upon the lands of these complainants and cut down, dug up, destroyed and carried away said hedge for a distance, as before shown, of twelve feet, so that it cannot now again be restored in less than about eight years, and then only at great expense on the part of these complainants.

13. Your complainants further allege that the hereinbefore re-

cited acts of said defendant, with respect to your complainants' property, constitute a trespass, and by reason of such trespass your complainants have already suffered great injury and damage, and, if the defendant be permitted to proceed in the premises, your complainants will suffer irreparable injury and damage.

Wherefore, inasmuch as your complainants are without remedy save in this Honorable Court where such matters are
10 properly cognizable, they pray:

1. That the said Lewis E. Smoot may be made party defendant to this bill and duly served with process, requiring him to be and appear in this Honorable Court by some certain day to be in said process named to answer the premises and abide by and perform such order or decree as may be passed herein.

2. That the defendant may be enjoined and restrained from further proceeding with the erection of said bay-window, or of so much thereof as projects over and upon the lands of the complainants, and may be decreed to forthwith remove said last-mentioned portion of said bay-window and restore the complainants to their original condition in respect of said lands as existing before the commencement of said erection.

3. That a temporary injunction may be issued restraining the defendant from proceeding further with the erection of so much of said bay window as projects as aforesaid over the said lands of these complainants.

4. That a rule to show cause may be issued requiring the said Lewis E. Smoot to show cause, if any he has, on a day to be therein named, why the prayers of this bill should not be granted.

And for such further and other relief as the nature of the case may require and to the Court may seem fit.

And complainants will ever pray, &c. &c.

JULIA TURNER HEYL,
EDWARD RANDOLPH HEYL,
HELEN HEYL,
CHARLES HEATH HEYL, JR,
11 DELPHINE TURNER HEYL,
By CHARLES H. HEYL,
Their Next of Friend.

SAM'L MADDOX,
Solicitor for Complainants.

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a Notary Public in and for the District of Columbia, personally appeared Charles H. Heyl, who, being first duly sworn according to law, deposes and says:

I have read over the foregoing bill signed by Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by me as their next friend, and know the contents thereof; the matters and things therein stated as of my personal knowledge are true, and those stated on information and belief I believe to be true.

CHARLES H. HEYL.

Subscribed and sworn to before me, this 9th day of January, A. D. 1906.

[SEAL.]

CARLTON FOX,
Notary Public, D. C.

12 *Answer of Lewis E. Smoot and Stipulation.*

Filed April 16, 1909.

In the Supreme Court of the District of Columbia.

No. 25945. In Equity.

JULIA TURNER HEYL et al.
vs.
LEWIS E. SMOOT.

The Answer of the Defendant, Lewis E. Smoot, to so much of the Bill of Complaint of the Complainants against this Defendant in Chancery exhibited, as this Defendant is advised it is material for him to make answer to, answering says:

1, 2 & 3. Answering the first, second and third paragraphs of said bill, this defendant says that he believes the averments of fact therein set forth to be true, except that he is not advised as to the precise value of said dwelling.

4. Answering the 4th paragraph of said bill, this defendant says that he admits the facts therein averred to be true, except as to the position of the hedge, which defendant is informed and believes was set close to the eastern boundary line of said lot and by its roots and branches extended a considerable distance over upon the adjoining property.

5 & 6. Answering the 5th and 6th paragraphs of said bill this defendant admits the averments of fact therein to be substanti-
13 ally correct, except that this defendant avers the fact to be that prior to the filing of the bill in this cause the projection on the westerly side of defendant's building described in the 6th paragraph of the bill of complaint had been completely constructed and the roof placed thereon and that no portion of the wall complained of in said paragraph was constructed or any work done thereon after the filing of this bill.

7. Answering the 7th paragraph of said bill, this defendant says it is true that he procured the Surveyor of the District to enter upon the land in question and set out the foundation of the west wall of the projection of defendant's building upon the lands of the complainants and the defendant, but defendant further says that the said foundation does not rest equally upon the lands of the complainants and the defendant but projects over and upon the land of the complainants only the distance of 9 inches, said foundation wall being about two feet thick, and that so much of the superstructure of said wall as rises above the grade-line projects over upon the land of the complainants only the distance of 6 inches.

Further answering said paragraph this defendant says that the said wall so laid partly upon the lands of the complainants and of this defendant is a party wall within the definition of the building regulations and is properly placed in part upon the lands of the complainants under said regulations duly promulgated by the Commissioners of the District under authority of an Act of Congress.

8, 9 & 10. Answering the 8th, 9th, and 10th paragraphs of
14 said bill, this defendant says that he is advised that the averments thereof are conclusions of law, the correctness of which this defendant does not admit and as to which he is advised it is not material for him to make any further or other answer.

11. Answering the 11th paragraph of said bill this defendant denies that the said wall so laid in part upon the lands of the complainants and this defendant is not a party wall, but that the same is in all respects a party wall, as the same is provided for and defined in the building regulations of the District of Columbia and that the same can be readily utilized, as such by the complainants should they desire at any time to make use of the same and further answering this defendant says that it is unnecessary that the walls abutting upon and connected with the party wall should meet the same at right angles, nor is it unusual in practice for such abutting or connecting walls to be united with the party wall in the manner described in the bill.

12. Answering the 12th paragraph of the bill this defendant says that it is true that the defendant cut down a portion of the hedge in the bill described, which was growing at the place where the party wall was constructed, but this defendant says that such destruction of the hedge was unavoidable under any circumstances and was done with proper care, that the said hedge is a rapidly growing shrub and can be easily restored by planting new plants along the line from which it was removed. Defendant further states that he does not know and can therefore neither admit nor deny whether the complainants' next friend was absent from the city at the time the defendant entered upon the lands as alleged, but this defend-
15 ant states that the counsel of the complainants was advised of the purpose of the defendant so to enter upon said land and that said entry upon said land and the destruction of the hedge and the excavation for the wall were begun in the latter part of September and that this defendant supposed until the filing of this bill in January thereafter that the complainants through their next friend acquiesced in the course pursued by this defendant.

13. Answering the 13th paragraph of said bill this defendant says that the averments therein are matters of law, the correctness of which he does not admit and as to which he is advised that he is not required to make any further or other answer.

Further answering said bill this defendant says that he was not aware until after the filing of this bill that the land in controversy belonged to the complainants, but was under the belief that it was owned by their father and next friend and that before entering upon the same he endeavored to reach an amicable agreement with the complainants' next friend and while the complainants' next friend

never actually assented to this defendant's contentions of right, this defendant believed that he had abandoned opposition thereto.

Further answering said bill this defendant says that the complainants have not in and by their said bill shown any cause for relief of equitable cognizance, but that for the alleged wrongs of which the said bill complains, if any such have been committed, they have a full, adequate and complete remedy at law, and this defendant claims the same benefit of this objection as if he had specially
16 demurred to the bill therefor.

Further answering said bill this defendant says that he is advised that the Act of Congress, approved June 14, 1878, authorizing the Commissioners of the District of Columbia to make and enforce building regulations, does not limit the authority of the Commissioners in that regard to the territory embraced within the boundaries of the original City of Washington, but that the authority so conferred extends throughout the entire District of Columbia, and that the regulations made by the said Commissioners under the authority of said statute including section sixty-two relating to the construction of party walls, are made without restriction as to place and in terms purporting to extend over the entire District.

This defendant further says that he is informed and believes and therefore avers that said regulation as to party walls has been recognized and applied with practical universality throughout the District and beyond the confines of the original City of Washington, and that in the various sections outside the original city limits during the years of development and growth of the city many hundreds of houses have been built with party walls in the manner prescribed and in accordance with the provisions of the said regulation upon the assumption and common consent that the said regulation applied to and controlled the construction thereof.

And having fully answered he prays to be hence dismissed with his reasonable costs in this behalf sustained.

LEWIS E. SMOOT.

17 I do solemnly swear that I have read the annexed and foregoing answer by me subscribed and know the contents thereof and that the matters and things therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

LEWIS E. SMOOT.

Subscribed and sworn to before me this first day of May, A. D. 1906.

J. WM. REILY,
Notary Public, D. C.

It is hereby stipulated, between counsel for complainants and defendant, that the foregoing copy of the answer of the defendant, Lewis E. Smoot, may be substituted in the record for the original answer which has been mislaid from the files.

MADDOX & GATLEY,
Solicitors for Complainants.
W. G. JOHNSON,
Solicitor for Defendant.

Joinder of Issue.

Filed May 9, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 25945.

JULIA TURNER HEYL et al.
vs.
LEWIS E. SMOOT.

The complainants hereby join issue with the defendant.

SAM'L MADDOX,
Attorney for Complainants.

18 *Testimony on Behalf of Complainants.*

Filed October 12, 1908.

In the Supreme Court of the District of Columbia.

In Equity. No. 25945.

HEYL
vs.
SMOOT.

WASHINGTON, D. C., *June* 19, 1907—2 o'clock p. m.

Met pursuant to notice at the office of Samuel Maddox, Washington, D. C.

Present on behalf of the complainants, Mr. Maddox.

Present on behalf of the defendant, Mr. Johnson.

Whereupon JAMES P. PERRY, a witness of lawful age, called by and on behalf of the complainants, having been first duly sworn, is examined.

By Mr. MADDOX:

Q. What is your business? A. I am Assistant Inspector of Buildings for the District of Columbia.

Q. How long have you been so engaged? A. For three years and a half.

Q. Did you inspect the premises built by Mr. Smoot at
19 No. 2007 Wyoming avenue, in this city? A. Yes, sir.

Q. What did you find there? A. In what way?

Q. For what was the excavation made? A. The excavation for the foundations, and the trenches.

Q. The foundation of what? A. The foundation for the cellar. They were excavated. The whole foundation for the cellar was ex-

cavated and then, of course, below the bottom of the cellar trenches were cut to receive the footings of concrete.

Q. What did you find with respect to the bay window on the west? A. I found the trenches were cut there to receive the concrete footings. The concrete had been put in place and the brickwork started. The surveyor certified to the location of the wall.

Q. Where was this bay window; was it on the same line with or parallel with the adjoining line? A. I believe the survey shows that it is parallel, and is located on the adjoining property to the west to the extent of about five inches.

Q. In the first place, how wide was the concrete? A. Two feet six inches wide.

Q. And how thick? A. One foot.

Q. How far west did that extend from the main wall of
20 the building? A. From the front wall?

Q. From the west wall of the building? A. Are you speaking of the concrete itself?

Q. Yes. A. I should say about eleven inches over the party line, because the center of the concrete is supposed to be underneath the center of the wall. You see the wall was not quite located on the party line. That was five inches away from the center of the party line, from Mr. Smoot's side, going west.

Q. What was built above the concrete? A. A brick wall 18 inches thick.

Q. How high did that go? A. That went up to about the grade of Mr. Smoot's lot, or both lots, and then was faced up with stone.

Q. With what kind of stone? A. It was a granite base.

Q. How high was that granite base? A. The granite base ran up seven inches. Then there was a marble water table on top of that, running up two feet.

Q. Was not the granite base what you call the water table? A. No; there was a granite base and then there was a water table on top of that, and a belt course on top of that again, making a series of offsets.

21 Q. How was this granite water table backed up. A. It was backed up with brickwork.

Q. Over the top of the marble belt course, what was there? A. Over the top of the marble belt course there was a 13-inch brick wall.

Q. How far did that extend? A. That extended up to the top of the window.

Q. How high is that? A. It is 12 feet 3 inches above the marble base. Then the roof of the bay window was on top of that. It has only been run one story high.

Q. How wide, north and south, is the west wall of that window? A. Ten feet two inches.

Q. That is all brickwork? A. That is all brickwork except the base, the base of course being granite with the marble belt course on top.

Q. How much beyond that brick wall does the foundation pro-

ject, into the lot on the west? A. It must be in the neighborhood of 14 inches beyond the party wall.

Q. Have you made a sketch showing the foundation of that window and an elevation of the window? A. Yes, sir.

Q. Is this it (exhibiting a paper to the witness)? A. Yes, sir, it is.

22 Mr. MADDOX: I offer this sketch in evidence.

(The above mentioned sketch is marked "Exhibit C. H. D. No. 1, and the same is hereto attached.)

(Here follows Sketch, Ex. C. H. D. No. 1.)

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Perry, who made this drawing. A. I did.

Q. From what? A. From actual measurements of the building.

Q. You said in your direct examination, as I understood you, that these foundations extended about five inches over the division line as fixed by the surveyor. A. No; the wall itself extends five inches over, and then, of course, the footings extend about eight inches beyond the face of the wall.

Q. Then when you spoke about something extending five inches beyond, you referred to the brickwork? A. That refers to the brick wall. It is a 13-inch brick wall, and it is five inches beyond the party line.

Q. Are you sure that the west brick wall of the bay window is a 13-inch wall? A. Yes, sir.

Q. On this plat, which has been marked "Exhibit C. H. D. No. 1", you have indicated the line between the two lots? A. Yes, sir.

Q. Then you say the concrete base that you show, is
23 two feet 6 inches wide? A. Yes, sir.

Q. Is that set equally on both sides of the line? A. Not quite. It does not show that on the sketch.

Q. You think that projects 13 inches over the party line? A. Yes, sir.

Q. You refer to the concrete base? A. Yes, sir.

Q. How deep is that below the surface of the grade of the lot? A. I couldn't tell you that exactly. I can tell you by referring to the plat. It is marked there in figures. To the bottom of the concrete is 7 feet 11 inches.

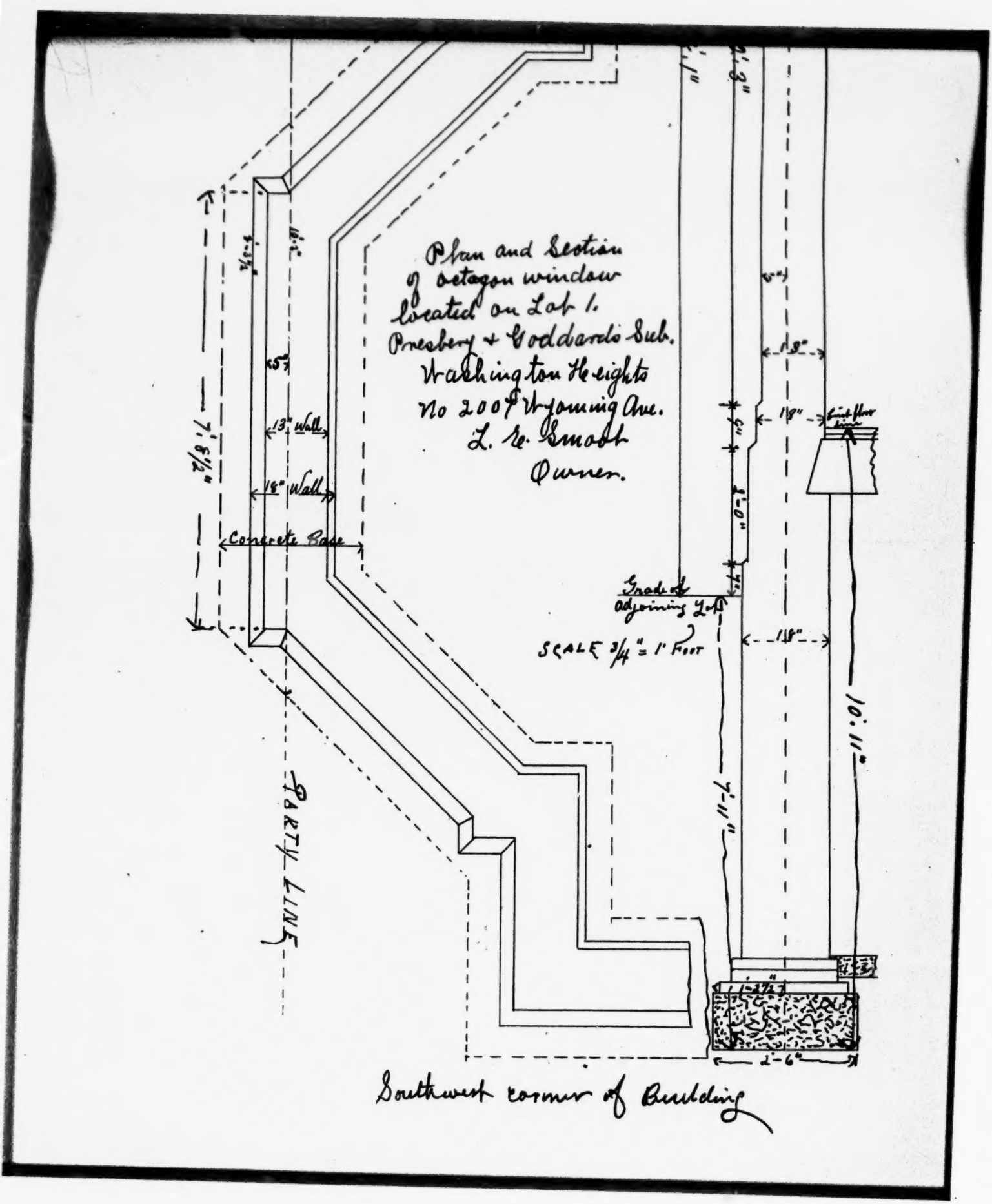
Q. Of what is that concrete composed? A. It is composed of cement, sand and broken stone.

Q. Did you see it after it had set? A. Yes.

Q. Was it perfectly solid? A. It was perfectly solid.

Q. And how much do you say it was below the surface? A. 7

Bottom of Bay Window
Front of Bay Window
2' -6"
Ext. Cnk. D-201
PARTY LINE


Plan and Section
of octagon window
located on Lot 1.
Presbery + Goddard's Sub.
Washington Heights
No 2007 Wyoming Ave.
L. Re. Smoot
Owner.
13" Wall
18" Wall
Concrete Base
7'-8½"
5'-3"
16'-2"
5"
2'-3"
1'-1"
18"
6"
1'-0"
Grade of
adjoining Lot
SCALE 3/4" = 1' FOOT
10'-11"
7'-11"
2'-6"
PARTY LINE
Southwest corner of Building

feet 11 inches from the grade of the lot to the bottom of the concrete.

Q. How thick is it? A. It is one foot thick.

24 Q. So that it lacks one inch of being eight feet below the surface? A. Yes, sir.

Q. You have indicated here an 18-inch wall. A. Yes, sir.

Q. Is that the wall that you say is composed of brick? A. Yes, sir.

Q. And how much do you say that projects over? A. That is located equally on the concrete footing.

Q. How much does it project over the party line? A. 7½ inches.

Q. Then on top of that you have a 13-inch wall. A. Yes, sir.

Q. And that projects over 5 inches? A. Yes, sir; of course you understand now I am giving you that measurement under the surveyor's say so. We simply take the surveyor's plat for the location of the wall.

Q. For the location of the wall and lot line? A. Yes.

Q. That is, assuming that the surveyor correctly located the line between the two lots, and the lines of these walls and you measured the thickness of the wall? A. Yes, sir.

Q. And that is how you got these figures? A. Yes, sir.

25 Q. The dimensions you give as to the thickness of the concrete base, the foundation wall and the superstructure, are actual measurements? A. Yes, sir.

Q. Without any reference to lot lines? A. Without any reference to that whatever.

Q. How long has it been since you have seen them? A. It is about a year and a half, I guess.

Q. You have not seen them since the work was finished? A. No; the house was about completed the last time I saw it.

Q. Had the earth all been filled in? A. You mean around the walls?

Q. Yes. A. Yes.

Q. It had all been restored? A. All restored; yes, sir.

Q. In the way it was before? A. I couldn't tell you what the conditions were before. We are not called into a building until the trenches are ready to be inspected.

Q. At all events it had all been refilled and sodded? A. All refilled and sodded, and completed.

Q. How long ago was that? A. It was September 30, 1906. I see I have got a date here, and it must have been just previous to that.

JAMES P. PERRY.

By the Examiner by Consent.

26 Subscribed and sworn to before me this —— day of —— 1907.

——

Examiner in Chancery.

27 SNOWDEN ASHFORD, a witness of lawful age, called by and on behalf of the complainants, having been first duly sworn, is examined.

By Mr. MADDOX:

Q. You are the Inspector of Buildings for the District of Columbia? A. Yes, sir.

Q. How long have you been so engaged? A. Since December, 1901.

Q. Are you acquainted with the character of the bay window on the west side of Mr. Smoot's house, No. 2007 Wyoming avenue? A. Yes; I have examined the plans.

Q. When was your attention first called to that? A. I think that my special attention was called to it, outside of a general view of the plans, in connection with the request to me to locate it.

Q. From whom did that communication come? A. From Mr. Smoot.

Q. Have you that letter? A. I think I have.

Q. Do you know how far back that bay window is from the front of the house? A. My recollection is that it is about 12 or 15 feet.

Q. When you received that communication from Mr. Smoot, what did you do. A. I considered the question of locating the
28 windows there, and concluded that I had not the authority to authorize the location of a portion of that bay window as a party wall.

Q. Why not?

Mr. JOHNSON: I object to any testimony by the witness as to what he thought his legal authority was or was not, for the reason that it is calling for an opinion.

By Mr. MADDOX:

Q. What is the custom of the office with regard to locating party walls outside of the limits of the city? A. They have never been authorized outside of the city.

Q. Outside of Florida avenue?

Mr. JOHNSON: I object to the question on the ground that the custom of the office is irrelevant and immaterial.

A. Outside of Florida avenue.

By Mr. MADDOX:

Q. Were you a defendant in the mandamus proceedings brought by Mr. Smoot? A. No, sir. The suit was brought while I was temporarily absent from the city, against the Acting Inspector of Buildings, and when I came back I had something to do with it.

Mr. MADDOX: I now offer in evidence the proceedings in case at law No. 47966, The United States on the Relation of Lewis C. Smoot, vs. A. M. Poynton, Acting Building Inspector.

29 Mr. JOHNSON: Do you offer the entire record in evidence?

Mr. MADDOX: Yes. I also want to introduce in the record here a copy of the original of a letter attached to the answer of the defendant in this case.

(Said letter is in the words and figures following, to-wit:)

"SEPT. 26, 1905.

"Edward H. Thomas, Esq., Corporation Counsel, &c., The District of Columbia.

DEAR SIR: Col. C. H. Heyl, of the army, owner of house and premises 2009 Wyoming Ave., Washington Heights, objects to having his neighbor on the east extend a bay-window eight feet in length over his land, as is proposed by Mr. Smoot, for two reasons:

1. Because a bay-window cannot properly be considered the section of a party wall.

2. Because the right to build a wall, partly on the lands of an adjoining owner, that is a party wall, is limited to the City proper and does not extend to country property.

And I have advised Col. Heyl to treat as a trespasser any person entering upon his land, be he civilian or District official, for the purpose of either laying out or building the coveted bay-window.

Yours truly,

30 (Signed)

SAM'L MADDOX,
Att'y for C. H. Heyl."

By Mr. MADDOX:

Q. Did you locate the lines? A. No, sir.

Q. For the reason that you have stated? A. Yes, sir.

Q. Are you familiar with the building as actually located? A. No; I can't say I am except from the plans.

Q. From the plans, how, if at all, would that window differ from a party wall? A. It would differ from an ordinary party wall in the fact that it is shaped in such a way that it would — of little or no benefit to the adjoining owner.

Q. Explain what you mean by that. A. A party wall is a wall located on the dividing line between two premises for their common use, and this window is octagon shape, where sides or splay would have to be altered materially, in order to continue this line for the use of a party wall.

Q. Is that what you call a splay? A. Yes; those sides that are not parallel with the building but are at an angle of 45 degrees with the building, are usually called splays.

Q. Explain what a splay is. A. A splay is a surface that is neither parallel to nor at right angles to some other surface. A very
31 good example of a splay is the jam of that window in your office. That is the splayed jam. You see it is not square with the window.

Q. Would such a splay as you have spoken of increase the expense of building a wall in connection with it? A. Yes; angles would have to be cut out in order to give a tie between the bay window erected and the new wall.

Q. How would that additional expense compare with the value of a wall of the size of this bay-window? A. I think it would amount to as much as the value of the wall.

Q. Would a 3-foot granite water table, 8 feet long at the foundation of the building, just above the foundation, be considered a part

of a party wall under the building regulations? A. If below the first floor, yes.

Q. Then anything above the first floor must be of what material? A. It must be brick, unless otherwise agreed upon between the parties.

Q. You mean between the adjoining owners? A. Yes.

Q. Have you the correspondence between you and Mr. Smoot? A. Yes, sir. (The witness produces letters.)

32 Q. This is your record pertaining to the erection of this house, is it? A. Yes.

Mr. MADDOX: I offer this correspondence in evidence.

It is stipulated by and between counsel that the originals of said letters may be copied into the record, and the original return to the witness.

The said letters are in the words and figures following, to-wit:

Office of the Corporation Counsel, Columbian Building,

JUNE 5, 1907.

Mr. Snowden Ashford, Building Inspector, D. C.

DEAR SIR: I have the honor to return herewith letter of L. E. Smoot dated Sept. 14, 1905 addressed to the Building Inspector, and a copy of his reply; also copies of permits dated Sept. 9th, '05, (two copies); also certificate of Approval; also permit issued by the Permit Clerk dated Sept. 9th, 1905, and a letter to Mr. Smoot from Joseph E. Wollard of Fairfax, Va.

Mr. Maddox has reuqested me to return these papers to you so that he might make use of them.

Very respectfully,

E. H. THOMAS,
Corporation Counsel.

(Stamped:) Received, June 5, 1907. Insp. of Bldgs., D. C."

33 Jos. E. Willard. C. Vernon Ford,
Commonwealth's Attorney.

Sep- 9, 1905. Willard & Ford,

Attorneys at Law,

Fairfax, Va.

695
Sep- 9, 1905.

WYATT BUILDING,
WASHINGTON, D. C., *Sept.* 8, 1905.

Mr. L. E. Smoot, Foot 3rd Street S. E., Washington, D. C.

DEAR SIR: Replying to yours of the 4th, permission is hereby given you to erect a temporary office on my lot northwest corner of 20th Street and Wyoming Avenue, N. W., Washington, D. C., with

the distinct understanding that same shall be placed on the northwest corner of said lot with the front on alley, and that you shall remove same at any time I may notify you in writing; and that in the event no such notice is given you will remove the office upon the completion of your dwelling, and upon such removal at any time will make good any damage which may occur in any manner to the said lot. All the above at your expense.

Trusting the above is satisfactory to you, I am,

Yours very truly,

JOS. E. WILLARD,
Per L.

34

695
Sep- 9, 1905.

No. —— 90 L. S. P. C. O., Vol. 25, Page 239.

Engineer Department, District of Columbia.
Office of the Permit Clerk.

WASHINGTON, *Sept.* 9, 1905.

SIR: Permission is hereby granted you erect a four (4) foot terrace, the same as on adjoining properties, front of 2007 Wyoming Avenue N. W.

(Stamped): "This permit Oct. 9 1905 expires."

The work to be done at your own risk and expense under the direction and subject to the requirements of this Office; to be commenced and completed within thirty days after date.

By order of the Engineer Commissioner, D. C.

H. M. WOODWARD,
Permit Clerk, D. C.

To A. C. Wycoff, 2007 Wyoming Ave., for L. E. Smoot.

35

(Paper slip attached.)

695
Sep- 9, 1905.

Plat of ground returned to Surveyor's Office —— 190–.

Office of Inspector of Plumbing, District of Columbia.

Certificate of Approval of Plan.

695
Sep- 9, 1905.

WASHINGTON, *Sept.* 7, 1905.

This certifies that A. F. Harlan has filed with me a plan of Plumbing and Drainage Work proposed to be placed in and upon building erected on Lot W. 50 of 1 Square 1 Wid. Mite to be known as No. 2007 Wyoming Av. N. W. owned by Lewis E. Smoot, and that upon

careful examination I find said plan satisfactory, and in accordance with the regulations governing plumbing and house drainage in the District of Columbia, and I hereby approve the same.

RICHARD A. O'BRIEN,
Act'g Inspector of Plumbing.

Class ——
No. ——

36 No. brick required 90 M—F Permit No. 695

Permit to Build.

Office of Inspector of Buildings,
District of Columbia.

WASHINGTON, *Sept. 9th,* 1905.

This is to Certify, That L. E. Smoot has permission to erect one two story & attice brick dwelling Lot 1, block — square — subdivision Widow's Mite, No. 2007 Wyoming Avenue N. W.

House number must be verified before being placed on buildings, in accordance with application No. 695 and drawings on file in this office, and subject to the provisions of the Building Regulations of the District.

The right is reserved to examine the buildings as often as may be necessary while in course of erection, and order any change in the construction that may be deemed requisite to insure sufficient strength, solidity and safety from fire.

This permit grants no right to change the grade or formation of any public terrace, parking or pavement; nor to build leads, coping or terrace steps outside the building line.

Permission is granted to lay a plank roadway across pavement. Deposit has been made to repair pavement, clean roadway and to cover cost of any damage to public property. Deposit No. 5026. Amount, $43.00.

37 By order of the Commissioners, D. C.
Fee Paid, $2.00.

S. ASHFORD,
Inspector of Buildings.

No projection beyond the building line.
Duplicate.
(Stamped:) Walls shall not be erected to a greater height than (1'-0") above footings until their correct location is certified by Surveyor D. C. See Sec. 27, Building Regulations.

Engineer Department,
District of Columbia.
Office of Inspector of Buildings. 695 A ½.

WASHINGTON, *Sept. 9th,* 1905.

This is to Certify, L. E. Smoot (owner) has permission to erect a temporary frame office or storage shed on the private property ad-

joining the new building under construction at 2007 Wyoming Ave. N. W.

Shed to be 10 x 16 feet, not over 11 feet high, and is not to be in contact with any dwelling or constructed so as to allow water to flow upon adjoining property or upon the sidewalk.

If the shed is located on the roadway, it must be confined to the space allotted to building material. (See Sections 145 to 156,
38 Building Regulations.)

Shed to be removed within 90 days, or when so ordered by the Inspector of Buildings.

Not to be used for advertising purposes.

[Fee, One Dollar.]*

By order of the Commissioners, D. C.

A. C. Wycoff, Builder, 2007 Wyoming Ave. Address.

Paid $ *No fee.*

S. ASHFORD,
Inspector of Buildings.
F.,

Main Office: Foot of Third Street S. E.
L. E. Smoot, Sand and Gravel.

WASHINGTON, D. C., *Sept. 14th*, 1905.

Mr. Snowden Ashford, Inspector of Buildings, Washington, D. C.

DEAR SIR: Referring to permit for house at 2007 Wyoming Ave. N. W. issued Sept. 9th, 1905, will say we wish to have same amended, as follows; In application—Question 17 "Thickness of party wall." "Basement" 18" first floor 13". The plat which accompanied application has been marked opposite party wall as follows;

"Distance"—Wall of house at this point is 6½" over line—
39 scale too small to show by rule. Basement wall 9" over.

The above questions were not answered correctly, in original application, through inadvertence and mistake.

Please make change in permit, as above, and oblige

Yours truly,

L. E. SMOOT.

A. F. H./H. F. H.

Copy.

SEPTEMBER 15, 1905.

Mr. L. E. Smoot, foot of Third Street S. E., Washington, D. C.

DEAR SIR: Your communication of September 14th, notifying the office of your change of plan and plat to locate party wall at 2007 Wyoming Avenue received, and in reply, beg to say that notice will be filed with the permit with the understanding that the party wall is located on your own responsibility without authority from this

* Words enclosed in brackets erased in copy.]

office, as I do not, at the present time, locate party walls outside of Florida Avenue or Washington City proper.

Very respectfully,

(Sgd.) S. ASHFORD,
Inspector of Buildings.

R. L. B.

40 Copy.

SEPTEMBER 21, 1905.

Mr. L. E. Smoot, Foot of Third Street S. E., Washington, D. C.

DEAR SIR: Replying to your letter of the 16th instant in which you request the Inspector of Buildings to set out the foundations and regulate the position of party wall for 2007 Wyoming Avenue, N. W.

From your letter I judge you have complied with section 26 of the Building Regulations and obtained the requisite building plat from the Surveyor, D. C. I would therefore call your attention to section 27 of the building regulations which sets forth how you may have walls verified by said Surveyor.

I would also respectfully call your attention to section 1589 of the Code, D. C., which prescribes the Surveyor's duties in reference to the location of party walls.

Very respectfully,

(Sgd.) A. M. POYNTON,
Act. Insp. of Bldgs.

R. L. B.

41 By Mr. MADDOX:

Q. Do you know whether or not this marble belt course is above or below the first floor? A. Yes; to the best of my recollection it is below the first floor.

Q. Would that show on the plans in your office? A. Yes; that shows on the plans.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Ashford, it is a part of your official duty to approve the plans of buildings before any permit for their erection is granted; is it not? A. Yes, sir.

Q. As a matter of fact I suppose it is not physically possible for you to examine and pass upon all of the plans that are submitted? A. No, sir.

Q. You do that through your assistants? A. Through my assistants; yes, sir.

Q. Does that include the examination of the dimensions of buildings? A. No; not necessarily so.

Q. Does it include the material and size of walls? A. Yes; it includes the materials, the thickness of the walls and the heights of the walls.

Q. And the interior construction? A. The interior construction.

42 Q. Have you exercised that authority with respect to houses beyond Florida avenue? A. Yes; anywhere in the District.

Q. How many houses, outside of Florida avenue, have been built under permits from the District, during your regime as Building Inspector, in which the division walls were built as party walls, resting partly on both lots. A. I suppose two thousand.

Q. Beyond Florida avenue? A. Yes.

Q. Do you know any prior to the time of your holding the office of Inspector? A. Yes; when I was Assistant Inspector.

Q. Have you any idea how many houses were built in that way at that time? A. Yes; I should say there were two thousand more—the whole of Columbia Heights and a great deal of Mt. Pleasant and Lanier Heights.

Q. Do you remember the fact that Mr. Poynton was Acting Inspector during your temporary absence in that summer? A. Yes.

Q. Do you recall when you went away? A. I think I went away about the 17th.

Q. Of what month? A. Of September.

Q. Do you know how long you were gone? A. Yes; two

43 weeks. That is the usual summer vacation.

Q. As a matter of fact, did you, yourself, have anything to do with these proceedings in court, the mandamus proceedings, brought against Mr. Poynton? A. Yes; my recollection is that I did. I know that I was called upon there.

Q. Are you sure you were here in the city at the time? A. Yes; I wrote Mr. Smoot a letter on the 15th of September, either a day or two days before I went away, and left instructions with Mr. Poynton. I sent the letter to Mr. Smoot before I left and the case did not come up until I returned. I was only away for about two weeks.

Q. Are the papers which you have brought here all of the papers and correspondence with relation to the matter, that you know of? A. All that I know of. They were all turned over to the Corporation Counsel's office. The whole case was sent over to him and this is what I got back from him.

Q. You stated that a party wall above the first floor must be of brick. By the first floor do you mean the first main floor of the house? A. The first floor above grade.

Q. How is the material of a party wall regulated? A. That is regulated under the old general regulations of George Washington.

Q. Do you mean it specifies the material? A. It does not

44 specify the material, but the thickness of the material.

Q. Do you mean that it specifies whether it should be of brick or stone? A. Yes; that it should be brick or stone of a certain thickness.

Q. Do you understand that regulation to control whether the material of a wall shall be brick or stone, and that it cannot be any other material than brick? A. No; not directly. It does not state that it shall be brick.

Q. Do you mean that there is any regulation, among the regulations covering the erection of buildings, promulgated by the Commissioners, under authority of an Act of Congress, specifying the material of which a party wall shall be built? A. Yes, sir; indirectly. It specifies that it shall not be stone and that it shall not be concrete, and that practically brings it down to brick, by elimination.

Q. Then when you speak of that, you mean that is the way you construe the regulation? A. That is the way I construe it. I might add, that the regulations, at one time, stated that a party wall should be not less than 13 inches thick, or a brick and a half.

Q. The west wall of this bay-window is built at right angles
45 to the front line of the lot; is it not? A. Yes, sir.

Q. And its two faces, the interior and exterior, are parallel with the division line? A. Yes, sir.

Q. How does that wall differ from any other party wall? A. At each extremity of the wall it runs off at an angle of 45 degrees.

Q. That wall does not run off? A. Yes; it is a continuation of that wall. The wall returns, as we call it. The same wall is brought around and is bent in at angle of 45 degrees.

Q. How can you say that a party wall bends around, any more than you can say that the side walls bend around? A. The side walls may bend around. There is no reason why they should not.

Q. Why, are they not separate walls, and merely detached? A. Well, you can take it in that way and say that this west wall is a wall parallel to the face of the house and is a continuation of the side wall. It is all in one; there is no line of demarkation.

Q. And so is the front wall? A. Yes; so it is on all houses. The front wall is a return of the side wall and the side wall is a return of the front wall.

Q. Suppose a man builds a house back from the building
46 line and has two side walls parallel to the adjoining owner's line, and has party walls on them; and then instead of building his front at right angles to the two side walls he places his front wall at an oblique angle, or the same angle that this bay window is. Is there anything to prevent those walls from being party walls? A. If he sets back from the front of the lot he may do that; but he creates a condition that imposes additional hardship upon the adjoining owner.

Q. Is there anything in the regulations to compel a man to build his house on the front building line, in order to have the privilege of a party wall? A. No; but there is something in the regulations that prevents him from putting up a window on the front of his house which is to come within nine inches of the party line.

Q. The bay-window, however, projects out into the street. A. Not necessarily so. That splayed side of the bay window must be nine inches from the party line, so that there would be an angle there of nine inches long, at right angles; and it is also required that the man should recess his front wall four inches to the party line leaving a slot for the adjoining owner to build into, in continuing the wall.

Q. To built against? A. Yes, sir.
47 Q. That is the purpose of it? A. Yes.
Q. The use of the wall itself, to support joist or things of that sort, is not affected by the splay of the bay window at all; is it? A. No.

Q. And the capacity and strength of the wall is not affected? A. No.

Q. Nor the ability to use the west face of it as a party wall? A. No; it is not affected, in that extent of the wall.

Q. What other right of the use of a party wall has an adjoining owner than the right to support a structure of his own? A. He has the right to build on it or to continue it.

Q. That is, he can have support, by resting joist and other structures on its face? A. Yes.

Q. And he may continue it in both directions, by building against the four-inch projecting space? A. Yes; he would have to build against more than four inches. He would have to build against 13 inches. The four-inch recess I referred to is only in the front of the house, so as to give each owner his full width, on the front part of the house. But the practice and requirement, where you ex-
48 tend the party wall, was that it should be a square bay, perfectly square; and all they would have to do, if that was a square bay-window, would be to put a strip, which they always do, right over that at that end of the building, from the wall. That holds the wall there so there is no side motion and no settlement, if there is any settlement in the new work, instead of leaving the old work this strip holds it and it has to go down in alignment with the old work. In the absence of that you would have to cut the wall out and tooth it in, as we call it, at every fifth brick, to cut into the wall.

Q. What is to prevent the continuing of this west wall in each direction, if the adjoining owner wishes to do so? A. I don't know of anything that would absolutely prevent it.

Q. Is there any mechanical difficulty about it? A. There is a little mechanical difficulty in joining onto that splayed wall. You would have to cut that corner right out until you get a square corner, cut into it and slot it right down, so as to get your brick there to hold.

Q. That is the only thing? A. That is the only thing.

Q. Just a little coldchisel work? A. Yes.

Q. As a matter of fact there is a projection or recess of four
49 inches? A. Yes.

Q. And the other half of the party wall is over on Mr. Smoot's line? A. Yes.

Q. And the only difference between that and the other party wall is that this adjoining wall to the bay window runs at an angle less than a right angle? A. Yes; and that window jam is splayed for the height of the window and would have to be notched out, to give you a chance to butt the party wall against the right angle abutment, instead of the splay.

Q. As a matter of fact, do you remember that before this wall was actually built there was change made? A. A change made in the plans?

Q. Yes; in the plan of that wall. A. No; I do not.

Q. Do you remember that Mr. Fuller, the architect, came down to the office and brought you some change in it? A. Yes; I remember about some change in the thickness of the wall. I thought you were talking about the contour of it.

Q. That was changed by letter? A. Yes.

Q. By this letter of Mr. Smoot's of September 14, 1905? A. Yes, sir.

50 Q. Do you know of any regulation as to how long a party wall has to be? A. No, sir; but I was in hopes that we were going to get some enlightenment on that question, in Mr. Hamilton's case; but we did not.

Q. You did not, personally, go up there to make any measurements of these walls? A. No, sir.

Q. And, as I understand it, you did not personally inspect them? A. No, sir; not officially. I only went up to see what a nice looking building it was, after office hours.

Q. When you speak of the bay-window being octagonal instead of hexagonal, do you refer to the turns that it makes in turning into the main wall? A. Yes, sir.

Q. That would give it what you describe as its octagonal character? A. Yes, sir; the sides are not equilateral; but the fact that it is fixed to the main wall makes it what we call an octagonal window.

Q. I believe you are not a mechanic? A. I have worked at most of the trades, except plumbing.

Q. You do not consider yourself a mechanic; do you? A. No.

51 Redirect examination.

By Mr. MADDOX:

Q. You say there have been built, in the last eight or ten years, three or four thousand houses outside of Florida avenue. You approved the plans of those houses, I suppose? A. Yes, sir.

Q. Did you or not locate any of the party walls? A. No, sir; we never locate the party wall. The permits distinctly state that houses are to be built within the confines of the lot or lots named. Every permit that is issued restricts the building to the premises named in the permit. As I stated, they locate party walls outside of these permits, by virtue of an easement or regulation, which was promulgated years ago; but we do not even authorize it in the city.

Recross-examination.

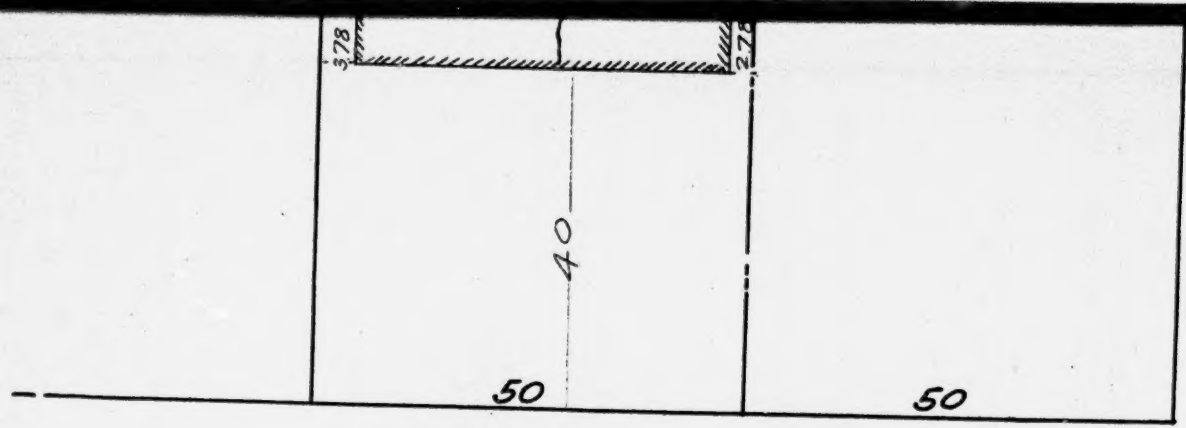
By Mr. JOHNSON:

Q. You do not authorize the laying of a wall on adjoining ground anywhere? A. No, sir.

Q. In the city or out of the city? A. No, sir.

Q. And these party walls, resting in part on the two adjoining lots, have been built in the manner you have stated, both in the city and without the city? A. Yes sir.

52 Q. And when you speak about the permits limiting the building to the lot mentioned in the permit, you refer also to permits withing the city as well as without the city? A. All permits.



I hereby certify, *That the foregoing plat is correct in accordance with Law and Record. Actual survey made this* 15th *day of* Sept. *1906., for* Samuel Maddox.

M. A. Hagner.

Asst. *Surveyor, District of Columbia.*

OK JMB

19

Ex. ~~Mrs H Dell~~ C.K.D. No 2

Form 906, E. D.—3-26-06—1,000. 17601 M. 3

Surveyor's Office,

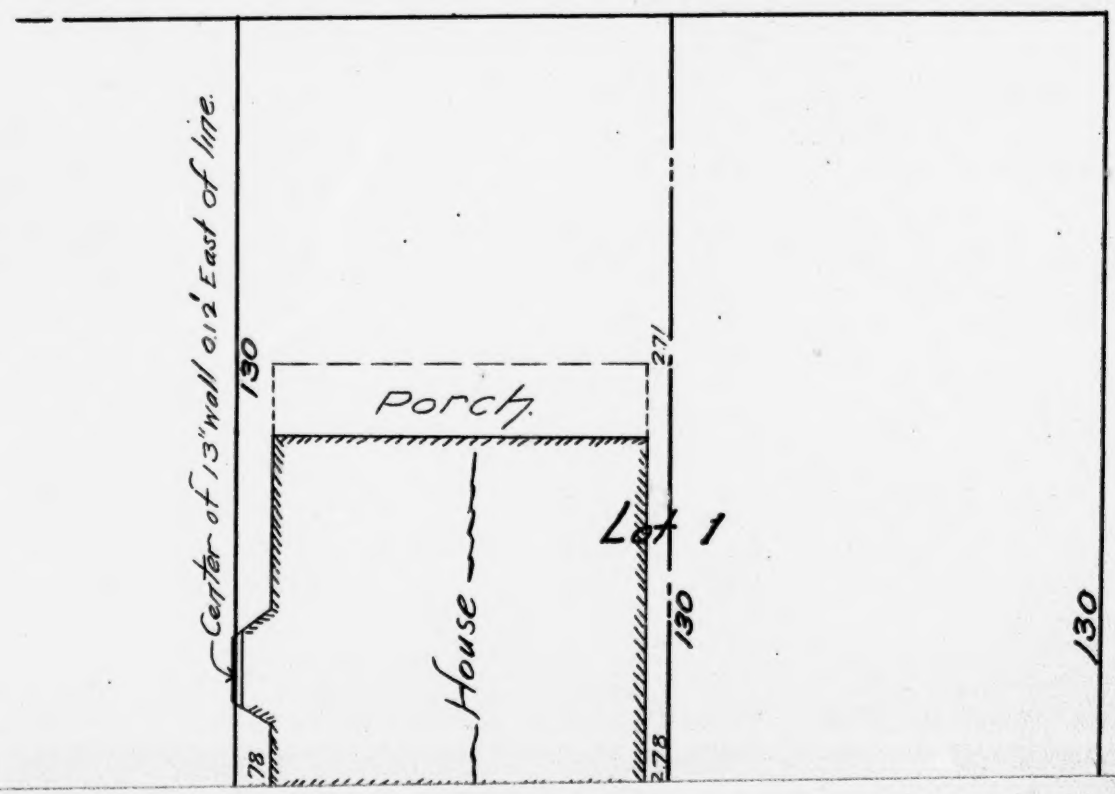
DISTRICT OF COLUMBIA.

Washington, Sept. 17th 1906.

Plat of Survey and locate house on West 50ft. of lot 1. Truesdell subd. of Widows Mite.

5577.

Ex. Chas. C.K.D. No 2



Q. There is no difference in the permits? A. There is no difference. The party line shown on the plans is purely an arbitrary arrangement. I do not know whether it is within the confines of a man's property or not. There is absolutely no way to ascertain that his lot is only 16 feet wide, because it says that it is 16 feet wide, and I do not undertake to ascertain that. I give him a permit to build on his lot, whatever lot he names in his application, and on no other lot.

Q. And a house of the character and description shown in the plans and specifications? A. Yes.

By Mr. MADDOX:

Q. Who, then, determines where the party line shall go? A. That takes the joint action of the surveyor's office and my office. If the applicant elects to have a survey made, we give the surveyor's office a certificate and he locates the party wall, according to the lot on the statement. Sometimes they will elect not to have a party wall; but the plans show just the same. On this plat that
53 goes to the surveyor they indicate whether they intend to build a party wall or not, and he locates it and certifies to it as a party wall. The only connection I have with it is to see that, if it is a party wall, it is built according to the regulations for party walls as to thickness, dimensions, &c.

SNOWDEN ASHFORD,
By the Examiner by Consent.

Subscribed and sworn to before me this — day of ——, 1907.

——— ———,
Examiner in Chancery.

Mr. MADDOX: I now want to offer in evidence the plat of survey of the location of house No. 2007 Wyoming avenue, made by the surveyor of the District of Columbia.

The above mentioned plat is attached hereto, marked "Exhibit C. D. H. No. 2."

(Here follows plat, Exhibit C. D. H. No. 2.)

54 JAMES T. WILSON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined.

By Mr. MADDOX:

Q. Where do you live? A. No. 1825 F street northwest.

Q. What were you doing in the summer of 1905? A. I was working for the Quartermaster, and taking care of Colonel Heyl's house.

Q. What house is that? A. No. 2009 Wyoming avenue.
Q. Where was Colonel Heyl? A. He was supposed to be at Cape May.
Q. When was your attention first directed to the preparation for the building of the house on the lot adjoining Colonel Heyl's house on the east? A. I don't know the exact date; but it was in that month.
Q. What directed your attention to it? A. By some pegs being drove on the inside of the hedge. I asked the contractor what those things were doing there and he said they were going to build a party wall and going to cut that hedge out. I said: "Well, I am taking care of this property for Colonel Heyl, and I would like to notify him." So he said: "Well, I don't know; I've got orders to cut it out. I said: "You will wait until I notify him?" He said: "I will wait a little while, probably a day or two." Then I written
55 to Colonel Heyl immediately, and that very evening, I believe it was, or either on the second or third day, I went there and the hedge was cut.
Q. When was it cut; in the daytime or at night? A. It was cut in the day, because I went up in the morning and it wasn't cut; and when I went back in the afternoon it was gone. I didn't see no hedge at all.
Q. What kind of a hedge was that? A. I don't know exactly.
Q. How high was it? A. About so high (indicating).
Q. About four feet high? A. Every bit of that.
Q. Where was the hedge you are speaking of? A. It was between Colonel Heyl's and Mr. Smoot's ground.
Q. All the way from the front to the rear? A. Yes, sir; running all the way back.
Q. What became of the hedge after it was cut down? A. I couldn't tell you that. I never seen it no more.
Q. It was carried away, was it? A. I suppose it was carried away, because I didn't see it.
Q. Do you remember whether it was cut before the day Colonel Heyl got here from Cape May? A. Yes; before he got here.

56 Cross-examination.

By Mr. JOHNSON:

Q. Wilson, who was it you talked with, whom you call a contractor? A. I suppose it was the contractor.
Q. You don't know his name? A. No, sir; I don't know his name.
Q. The first you knew about it was you saw some pegs driven? A. Yes, sir.
Q. Then you asked this man about it? A. Yes, sir; I did.
Q. And he told you that he was going to build a party wall? A. That's what the contractor told me.
Q. Do you remember where those pegs were? A. They were just on the inside of Colonel Heyl's hedge. They stretched a line, a piece of fish line.
Q. Have you seen the house of Mr. Smoot, since it was built? A. Yes, sir; I have seen it time and time again.

Q. Have you seen the bay window? A. Yes, sir.

Q. Were those pegs driven where the bay window now is? A. Yes, sir; and that's where the foundation was dug.

57 Q. Those are the pegs to which you refer? A. Yes, sir.

Q. How long was it before the hedge was actually cut that you first saw those pegs? A. I think it was a couple of days. I told him: "It will take me two or three days to notify Colonel Heyl." He says: "I don't know about that. If my work don't come that way, I won't cut it until you hear from the Colonel."

Q. Was anything done at that time? A. Yes, sir; they had been digging there.

Q. There was work going on? A. Yes, sir; yes, indeed.

Q. Did Colonel Heyl come on here? A. He didn't come on here until after the hedge was cut.

Q. Did he come on? A. Yes, sir; I don't know how long it was afterwards; but it was possibly three or four days, or something like that, afterwards.

Q. Did you see anybody else besides this contractor? A. I seen a lot of workmen out there.

Q. Did you communicate with anyone else except Colonel Heyl? A. Yes, sir; after I heard from Colonel Heyl I did.

Q. With whom? A. With Mr. Maddox.

58 Q. How long was it after you communicated with Mr. Maddox that this hedge was cut? A. Why, the hedge was cut then.

Q. Are you sure of that? A. Yes, sir; it was cut then, because I didn't get a telegram from Colonel Heyl. I got a letter, and then when Colonel Heyl came on here the hedge was cut. I am sure the hedge was cut before Mr. Maddox went up there, because it was cut the very next day, or the day after—I don't exactly remember. I think it was about the second or third day, to the best of my recollection. I went up there in the morning and when I went back in the afternoon it was gone, and I never seen it no more.

Q. Were you at the house daily? A. Twice a day; morning and evening.

Q. All through the summer? A. Yes, sir; every day, and once on Sunday.

Q. Can you tell us how long it was after you first noticed work being done before you noticed them driving any pegs on Colonel Heyl's side of the lot? A. No, sir; I don't just know the day. Probably it was a week and probably more, because they dug pretty good foundations there and they dug it out pretty fast. Probably it was not that long. I don't want to tell nothing but what I know, because I never taken no account of what they were doing, until I seen the pegs drove there.

Q. You say you wrote to Colonel Heyl? A. Yes, sir.

59 Q. Did he send you any reply? A. I think he sent me a letter.

Q. What did you do with it? A. I suppose I destroyed it. I never do keep any mail like that.

Q. Do you remember whether you dated your letter to Colonel

Heyl? A. Yes, sir; I did. I hardly ever write a letter without dating it.

Q. So that if he has that letter it will show the date you wrote him? A. Yes; it will show the date I written him.

JAMES T. WILSON,
By the Examiner, by Consent.

Subscribed and sworn to before me this — day of ——, 1907.

——— ———,
Examiner in Chancery.

60 CHARLES H. HEYL, a witness of lawful age, called by and on behalf of the complainants, having been first duly sworn, is examined.

By Mr. MADDOX:

Q. What is your business? A. I am a Colonel in the United States Army, retired.

Q. Where do you live? A. I live at No. 2009 Wyoming avenue, Washington, D. C.

Q. Who owns that property? A. It belongs to the estate of Mrs. Heyl, deceased.

Q. Who are the five persons named as complainants in this bill? A. Julia Turner Heyl, Edward Randolph Heyl, Ellen Heyl, Charles E. Heyl, Jr., and Delphine Turner Heyl.

Q. Are they all infants? A. Yes, sir; they are all minors, and the heirs at law of Mrs. Heyl, who died intestate.

Q. How is that property improved? A. It is improved by a Colonial house.

Q. On which side of the lot? A. On the west side of the lot, 18 inches inside of the west line.

Q. How far back from the street? A. 40 feet from the street front.

Q. How wide is the house? A. The house is 30 feet wide, and there is an opening on the side of about 31½ feet. The
61 lot is 62½ feet wide.

Q. Then the lot to the east is open and unbuilt upon? A. Yes, sir.

Q. Between you and the property of Mr. Smoot? A. Yes, sir; and the entire lot is enclosed by a privet hedge, about 3½ feet high, which was planted there in the fall of 1898 and the spring of 1899. At the time it was cut out it was about 3 or 3½ feet high.

Q. And seven or eight years old? A. Yes, sir.

Q. Are there hedges like that in that vicinity? A. All the properties in that neighborhood have enclosures of the same kind, on the north side of Wyoming avenue, continuing over to Colonel Truesdell's place on Columbia Road.

Q. How were the houses built in that locality until Mr. Smoot came there? A. They were always built in a lot with grounds surrounding them. There is not a house that is built on lot lines.

Q. You mean there are no party walls? A. I mean that they are all built inside of the lines, except the Smoot house, which was built

about two years ago, and only a portion of that is built on the party line.

Q. Where were you in the summer and fall of 1905? A.
62 I was at Cape May, New Jersey.

Q. Do you know when you first heard about this proposed building? A. It was sometime during September; but I cannot tell the exact date. It was either the fore part of September or the latter part of September. I have no way of refreshing my memory about that, except perhaps you may have a letter from me written about that time and you can tell by referring to it. (The witness examines a letter.) It was about the middle of September. This letter is dated September 16th and that was a day or two afterwards. I think very likely September 16th was on Saturday, because I say in the telegram "Wait until Monday for reply. Have written today." So the probabilities are that knowing you would not get it on Sunday and would get it on Monday morning——

Q. From whom did you hear about this work being done? A. The first intimation I had of it I received a letter from James Wilson, my man, who had charge of my house during the summer, that they were building next door and were going to cut in a foundation and take the hedge out.

Q. Do you remember when you returned to the city that fall? A. It was in the early part of October. I think it was about the 14th or 15th; but I am not quite sure whether it was so late as that. That is my impression.

63 Q. When you returned what was the condition of the hedge? A. Before that I came up here, as soon as I heard from James. He wrote me about it and I received the letter too late to come that day. One day intervened and I came the following day. When I came up the hedge was gone. In fact I started in there with a controversy with a man who was digging with a pick, and grubbing out the roots, and taking out what was left of the hedge. He told me that he was just working under orders. I could not find anybody in authority. I did not know with whom to talk. This man, whom I afterwards understood was a builder, I did not see at that time. The man I did talk with was simply one of the laborers who told me that he was working under orders. I could not find anybody in authority, and this man, while I was there, never came to see me about it.

Q. You came up specially, then, from Cape May to see about it? A. I came up to inquire into it.

Q. As soon as you heard from James? A. Yes; only one day intervened.

Q. Was that before these letters were written? A. It was before the letter was written to you.

Q. Then it was before September 16th? A. Yes, sir; because when I came up James had been to see you, in the meantime.
64 My correspondence, after that, was with you.

Q. Were there any remnants of the hedge there? A. None whatever. There were a few roots that the man was grubbing out when I saw him on that day. I left Philadelphia on the early train and got here about noon. It might have been one or two o'clock when I saw him, and the hedge was gone then. Whether it had

been taken out the day before or on that morning, I couldn't say. I don't know.

Q. How long after you heard from James was it before you started up here? A. There was one day intervened after I got his letter. I could not leave the next day, so I took an early train the following morning. I never did see these people next door and did not know about their intentions, or whether they expected to build or entertained the idea of building a party wall or not. I never had an opportunity of meeting them afterwards, and did not know anything about it.

Q. When you came up the first time, did you see Mr. Fuller, the architect? A. No, not the first time. I did not know Mr. Fuller was in charge the first time I came.

Q. When you returned in October, did you see him? A. Yes; I saw Mr. Fuller.

Q. Did he show you the plans? A. Yes, he showed so much of the plans as referred to the bay window.

65 Q. What, if anything, was said then about a projecting cornice? A. I said to Mr. Fuller: "How much room have you on the other side?" He said there was about 2 feet 2½ inches. I said: "Why don't you put your house the other way, so that you won't have to go over on my line?" He said that they did not have room enough; that they had to go over on this side, because it left too little room on the other side. We were then looking over the ground plan. He showed me the plan of the bay-window and it had a long cornice on it. I said to him: "You are already over my line and you cannot come over further with that cornice." He said: "I guess that is so." Subsequently I noticed that has been changed, although the plan did provide for a projecting cornice.

Q. What, if anything, did you say to him about taking the hedge away? A. I do not recall, except that I expressed my views strongly to him, and stated that I simply thought the whole thing was an outrage, and that it was unjust; that I had never been consulted and never knew anything about it; and that they did not give me any opportunity, amicably, or in any other way to settle the question.

Q. Where was that hedge? A. It was inside of my line, on property between me and what had been Mr. Truesdell's property before. It was afterwards sold to Willard, and Willard, I believe, sold it to Smoot.

66 Q. Do you recall how far inside your line it was? A. I can't exactly recall. I was always under the impression it was about nine inches inside the line. I think it was fully eight inches inside. The hedge was not set out by me. It was set out while I was away and Colonel Truesdell himself supervised and superintended it. He put the hedge back purposely, knowing it would spread out, and he did not want it to be on the adjoining land.

Q. Did you ever see Mr. Smoot or try to see him? A. I never saw him, but I tried to see him. I called him up several times on the 'phone and once his clerk or bookkeeper came up to see me, as he said, to arrange matters. But I could not arrange any matter with him, because I did not consider that he was in authority to

decide a question of that kind with me. I talked with him and told him I would like to talk the matter over amicably and settle it, if possible, with Mr. Smoot. My recollection is that he said Mr. Smoot was away or had been away, or was not well. At any rate, I never heard from him again and never saw him. The man never came back. I think once after that I called him up on the 'phone; but he told me Mr. Smoot was out of town.

Q. Do you remember when this work on that bay window was done? A. What do you mean; when it was commenced?

Q. When it was begun and when it was finished? A. My impression is that it was finished sometime in February of the
67 following year—that would make it 1906. I made a note of it.

Q. You mean the bay window was finished about February? A. Yes, sir.

Q. On what did you make the note you are referring to? A. I made it on an envelope.

Q. I hand you an envelope and ask you if that is the one you refer to? A. Yes, sir. I think it was a letter from you.

Mr. MADDOX: I offer this memorandum in evidence.

(The above mentioned memorandum is in the words and figures following, to-wit:)

"Flooring or covered roof, joists, etc., completed between Monday, January 15th and Wednesday, January 17th, '06 on the bay window in question."

By Mr. MADDOX:

Q. Is there any projection on the east side of Mr. Smoot's house? A. Yes, sir.

Q. What is it? A. It is a very handsome window. It appears to be over the stairway landing, about half way up, I imagine. I have never been inside of the house; but judging from the outside and its height, that is where I would suppose it to be located. It has a balcony, with projecting stones, and I think there is a railing
68 around it; although I am not quite sure about that. It is a large window, just such a window as you will find at a landing half way up the stairs, and there is a balcony outside.

Cross-examination.

By Mr. JOHNSON:

Q. Colonel, how much of this hedge was cut? A. I think about 12 feet, as near as I can recollect now. I measured it at the time.

Q. It was in the space occupied by the west wall of the bay window? A. Yes, sir; it was about 12 feet—not less than 10 feet. I think it was somewhere between 10 and 12 feet. My impression is it was about 12 feet.

Q. When did you go to Cape May? A. I don't remember at what time we went that summer. We usually go about the last of May or the first of second of June.

Q. At all events you were gone in June? A. Yes.

Q. Did you come back? A. Not until we moved up.

Q. I mean did you, individually, come back? A. I came back once on the occasion I have stated.

Q. Only one time? A. Yes; after getting the letter from my colored man.

Q. You came back only once, before your family returned?

69 A. Yes, sir.

Q. When did your family return? A. My family returned nearly a month after that. I think they came up about the 14th of October.

Q. It was sometime after the first of October? A. Yes, sir; it was after the first of October.

Q. And you think about the 14th of October? A. Somewhere about that time.

Q. So that from June until the 14th of October, you were only here twice? A. I was only here once.

Q. You came back about the 14th of October, did you not? A. Yes; but then we came up for good, to stay here. I did not come up from Cape May but once on this account.

Q. Did you authorize Mr. Maddox to act, in this matter, as your counsel? A. I did.

Q. Do you know how long he was acting in your behalf, before this hedge was cut? A. I don't know whether my man Wilson stated that or not; but he wrote me that night, and then went to see Mr. Maddox the next day. I think he told me it was the same day that he went to see Mr. Maddox, and Mr. McGregor, who was the builder of that house. He met him on the street, and McGregor went up there and had quite an altercation with this builder, whatever his name was.

70 Q. My question was whether you authorized Mr. Maddox to act for you as counsel? A. I don't quite understand your question.

Q. Before you heard from Wilson. A. I could not have authorized him before I heard from Wilson, because I did not know anything about it.

Q. That is just what I am asking you. A. You did not put your question clearly. I did not understand you.

Q. You did not authorize Mr. Maddox to intervene in this matter, before you heard from Wilson? A. No; I could not, because I didn't know there was anything going on until Wilson wrote to me, and then I wrote to Mr. Maddox to stop it, to initiate proceedings at once and put a stop to any further trespassing.

Q. You wrote Mr. Maddox before you came to Washington, or afterwards? A. I think it was the next day. I heard from Wilson and I wrote to Mr. Maddox the next day, and followed it up myself on the following day. The hedge was cut out then.

Q. Did you telegraph Mr. Maddox? A. I can't remember whether I did or not. It is quite likely I did. I don't remember.

Q. You are sure that you came up the day after you authorized Mr. Maddox to act for you? A. I think so.

Q. So that if Mr. Maddox was acting for you a week or
71 two before that hedge was cut, he was acting without your authority? A. No, he was not. It was not a week or ten days before the hedge was cut, because the hedge was cut when I got up here.

Q. Did you ever hear of a mandamus proceeding that was brought against the Acting Inspector of Buildings, with respect to this matter? A. I don't know anything about that.

Q. Do you remember hearing of it? A. I don't believe I did, except that it was talked about.

Q. You did not hear about that proceeding? A. I did not.

Q. Did you know there was a hearing in that mandamus proceeding, before Chief Justice Clabaugh? A. No, I did not.

Q. In which Mr. Maddox represented you? A. Well, if Mr. Maddox represented me he did it by authority. I do not remember about that. You are asking questions now about matters that have slipped my memory entirely.

Mr. MADDOX: I did not represent anybody in that hearing.

Mr. LUCKETT: You were present in court and wanted the Chief Justice to hear you.

Mr. MADDOX: I was over there at the hearing, and I was
72 Colonel Heyl's counsel; but I did not represent anybody.

By Mr. JOHNSON:

Q. You speak of some effort that you made to see Mr. Smoot. Did you learn, at the time you were trying to see Mr. Smoot, that he was ill with gastritis? A. I did not know what was the matter with him.

Q. Did you hear that he was ill? A. I don't know that he was ill.

Q. And you did not hear it? A. No; my impression is his clerk said that he was not well, or that he was out of town. I don't remember about that.

Q. Do you know that Mr. Smoot offered to restore the hedge as soon as the wall was built? A. No, I do not. I asked what expectation he had, if any, with reference to restoring the hedge; but I never heard that he had any such intention.

Q. And you never had submitted to you an offer to restore it? A. He never submitted anything to me.

Q. You never had submitted to you an offer to restore the hedge? A. No, sir.

Q. At any time? A. No, sir.

Q. Not through Mr. Maddox? A. I supposed you were
73 speaking about Mr. Smoot, or his representative.

Q. I am speaking of both. A. Mr. Maddox spoke to me about that, and I said I would not accept it; but I never had any dealings with the parties.

Q. That is what I had reference to, and I thought that was what you meant. Do you know who the gentleman was that you talked with, who represented Mr. Smoot? A. No, I do not. I never saw him before, and would not know him now if I were to see him. I

do not know who he was, more than that he said he was a clerk or bookkeeper for Mr. Smoot.

Q. As I understand it, your recollection and understanding of this matter is, that you did not know there were any building operations going on next door until you heard from Wilson? A. No.

Q. And that the second day after you heard from Wilson you came to Washington and the hedge was already destroyed? A. Yes, sir.

Q. It was cut out? A. Yes, sir.

Q. Is that your recollection of the event? A. Yes, sir.

Q. Then if Mr. Maddox had, several days or a week prior to the cutting of that hedge, represented you, he was authorized by
74 you to represent you in the matter, was he? A. He was.

Q. The hedge has been put back; has it not? A. No, sir; I planted some slips there myself last fall. I put it back myself; but it has never been put back by anyone else.

Q. I say that it has been put back? A. When you say it has been put back, the inference is that you mean the parties who took it away put it back.

Q. I do not mean that? A. That is the inference from your question. I planted a new hedge myself there last fall.

Q. After you declined to permit Mr. Smoot to do it? A. Yes.

Q. And it is still there? A. What there is of it.

Q. How long does it take it to grow? A. It took the last hedge seven or eight years to grow to that height. I think it has been stated that that is an easy growing hedge and would grow in a very short time; but anybody who has raised hedges like that knows differently. I have been cultivating that hedge myself ever since it was planted, and I know how long it takes to grow. A part of that hedge is there yet, and you can see what it was and what it would be if it was still there. That hedge was planted between seven and eight years ago.

CHARLES H. HEYL,
By the Examiner by Consent.

Subscribed and sworn to before me this — day of ——, 1907.

——— ———,
Examiner in Chancery.

75 The further taking of these depositions was thereupon adjourned subject to notice.

76 WASHINGTON, D. C., *October* 30, 1907—3 o'clock p. m.

Met pursuant to agreement at the office of Samuel Maddox, Esq., Washington, D. C.

Present on behalf of the complainants, Mr. Maddox.

Present on behalf of the defendant, Mr. Johnson.

Whereupon C. H. HEYL is recalled for further examination:

By Mr. MADDOX:

Q. Since you testified in this case, have you refreshed your recollection in regard to the time when you first heard that Mr. Smoot was going to build on the lot adjoining you? A. Yes sir; I have.

Q. When was it? A. After giving the testimony which I gave here before, sometime after returning to my home and looking over my files of letters, I found some correspondence between you and me which showed conclusively that I had made an error in the date that I stated I had come up here from Cape May.

Q. When was it you first came here? A. It was in September. I think I said before that it was in October.

Q. When was it that you first came to see me about it?
77 A. Sometime about the middle of September.

Q. Was it not before that date? A. It was during the fore part of September.

Q. You came to see me then? A. Yes. I had previously had a letter from my colored man, James Wilson, which first gave me the information of the intention to build, in which letter he told me that they would cut down——

Mr. JOHNSON: I object to the witness stating the contents of the letter.

The WITNESS: I simply want to state the information that I had that they intended to cut the hedge. After receiving that letter, I made a visit to Washington and called on Rozier Dulany, and then came down to see Mr. Maddox.

By Mr. MADDOX:

Q. What was the date of the first letter I wrote you on the subject? A. Subsequent to my return, you wrote me on the 14th of September, and I have that letter showing the letter postmarks. I answered that letter on the 16th of September.

Q. You stated in your testimony that you had not heard of the mandamus suit? A. I am coming to that. In reply to my letter of September 16, I had a letter from you on the 19th of September, in which I think you spoke of the Mandamus
78 proceedings. I have that letter here. Subsequently, I received a telegram from you, dated October 2nd, when I was still at Cape May, saying that the party wall case against the District had been abandoned, that being the mandamus proceeding, and that they would commence building to-morrow, and advising that I had better come home. I then came home.

Q. In response to that telegram, you came home? A. In response to your telegram, I came home.

Q. It was then you found that the hedge had been cut? A. The hedge was cut when I got home. It had been cut the night before, as I understood.

Q. You also stated that you never saw a letter from Mr. Smoot offering to withdraw the hedge? A. I think I understood that from you.

Q. The letter was to me? A. The letter was to you.

Q. You never had such a letter? A. No.

Q. But you saw the letter to me? A. Yes; I saw the letter to you. That is what I meant when I said I never heard from Mr. Smoot, because I never had any correspondence with him. I was really not in error when I stated that, because I had never had any correspondence with him.

79 Cross-examination.

By Mr. JOHNSON:

Q. You were not here at the time the suit against the District was abandoned? A. No sir; I only knew that by this telegram which Mr. Maddox sent me.

Q. Mr. Maddox was here at that time? A. I presume he was.

Q. And that telegram came from him here? A. Yes sir.

Mr. MADDOX: I will admit on the record that I not only was here, but I was in the court of Mr. Chief Justice Clabaugh when the matter was being discussed.

CHARLES H. HEYL,
By the Examiner by Consent.

Subscribed and sworn to before me this — day of ——, 1907.

Counsel for the complainant announced the testimony closed.

80 *Opinion.*

Filed January 22, 1909.

25945.

HEYL
v.
SMOOT.

Plaintiffs and defendant are adjoining lot owners in the District of Columbia outside of the limits of the original Federal city of Washington.

In building a dwelling house the defendant located it so that it would not fit on his own lot and overlapped the plaintiff's lot with a one story bay window wall about ten feet long. He undertakes to justify this appropriation of his neighbor's property by claiming that the face of the bay window is a party wall and that as such he is entitled to maintain it.

Party walls as such were not known to the Common Law and can rightfully be maintained only by

First, An agreement between owners; or

Second, By some Statute which provides for their existence and an appropriate method of establishing them.

Respecting the territory at bar, there is neither an arrangement or provision by land owners, nor is there any statute. The only Act of Congress which is suggested in support of the defendant's position is as follows:

81 "That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to make and enforce such rules and regulations relative to the sale of coal in the District of Columbia as shall insure full weight to the purchasers of coal; and all such building regulations for said District as they may deem advisable."

The "regulation" by appropriate authority of the exercise of a right already existing is quite different from depriving the property

owner of a vested right and revesting that right in another property owner, and this latter Congress has not seen fit to authorize or to provide for; by the use of the word "regulation" in the Act referred to, Congress had done no more than authorize the Commissioners to throw around the general right of property owners to erect buildings, such limitations as the public safety and general welfare may require: Congress has not created, and has not undertaken to authorize the Commissioners to create a procedure competent to deprive a property owner of the use of part of his property and give that interest to his neighbor.

Therefore the claim that the building regulations adopted by the Commissioners under authority of the Section justify the maintenance of the bay window wall on the property of the plaintiff cannot be sustained. A mandatory injunction may issue requiring its removal.

WRIGHT.

82 *Final Decree.*

Filed February 2, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 25945.

JULIA TURNER HEYL et al.
vs.
LEWIS E. SMOOT.

This cause coming on for final hearing on bill, answer, exhibits and proofs, was argued by counsel and duly considered by the Court, and thereupon it is this 2nd day of February, A. D. 1909, adjudged, ordered and decreed that the defendant, Lewis E. Smoot, be, and he is hereby, perpetually enjoined and restrained from maintaining and continuing on the land of the complainants, in the bill mentioned and described, any part of the bay window attached to and forming a part of his, said defendant's, dwelling house, on the West side thereof, built upon Part of Lot numbered One (1) in a subdivision of land in the District of Columbia known as "Widows Mite," as said subdivision is recorded in Liber County No. 12 of the records of the Surveyor of said District; and, further, that said defendant remove so much of said bay window as projects over and across the boundary line between the land of the complainants and said lot of the defendant and rests upon the land of the complainants; and, further, that this mandatory injunction be obeyed and executed by the defendant within sixty days from the date hereof.

83 It is further ordered that the defendant pay unto the complainants the costs of this suit, to be taxed by the Clerk, and have execution thereon as at law.

And from this decree the defendant prays an appeal to the Court of Appeals, which is hereby allowed and the penalty of a bond to act as a supersedeas fixed at $500.00.

By the Court:

WRIGHT, *Justice.*

Memoranda.

February 25, 1909.—Appeal bond (supersedeas) filed.
April 6, 1909.—Time in which to file Transcript of Record in Court of Appeals extended to April 26, A. D. 1909.

84 *Directions to Clerk for Preparation of Transcript of Record.*

Filed April 16, 1909.

In the Supreme Court of the District of Columbia.

No. 25945. In Equity.

JULIA TURNER HEYL et al.
vs.
LEWIS E. SMOOT.

The Clerk will please prepare the transcript of record on appeal to the Court of Appeals including therein the following:

1. Original Bill.
2. Answer of Lewis E. Smoot.
3. Replication.
4. Depositions.
5. Opinion of the Court.
6. Final Decree.
7. Appeal Bond.
8. Order extending time for filing record.
9. This designation of parts of record.

W. G. JOHNSON.

85 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 84 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 25945, In Equity, wherein Julia Turner Heyl, et al. are Complainants and Lewis E. Smoot is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of April, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2015. Lewis E. Smoot, appellant, vs. Julia Turner Heyl et al. Court of Appeals, District of Columbia. Filed Apr. 26, 1909. Henry W. Hodges, clerk.

Addition to Record Per Stipulation of Counsel.

Court of Appeals, District of Columbia, January Term, 1909.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL and Others.

Filed December 13, 1909.

Court of Appeals of the District of Columbia, October Term, 1909.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL and Others.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following transcript and digest from the record and proceedings in suit at Law #47966 on the dockets of the Clerk of the Supreme Court of the District of Columbia be and the same are hereby made part of the record on appeal in this cause, the same being considered as having the same force and effect as those specifically set forth in the record in this court.

On the 22nd day of September, 1905, appellee- filed a petition in the Supreme Court of the District of Columbia, and numbered At Law 47966, against A. M. Poynton, acting inspector of buildings, directing him to enter upon the land of petitioner and the land next adjoining on the west side "to set out the foundation and regulate the westernmost wall of petitioner's house." On the 2nd of October, 1905, Poynton answered the petition setting up that no such duty was imposed by law upon the Inspector of Buildings as thus suggested in the petition for mandamus, but that the Surveyor of the District of Columbia was charged with such duties. Respondent Poynton also averred in his answer that the owner of the land next adjoining on the west objected to having a party wall built over his land. Appended to the answer and made part of it was the letter of Heyl's attorney set out on page 15 of the printed record.

On the same day, October 2nd, the petitioner Smoot demurred to the answer. The demurrer was set down for hearing and the hearing was begun, but before it was concluded petitioner asked leave to withdraw the demurrer. A stipulation between counsel was thereupon entered into whereby it was agreed that the demurrer might be withdrawn on payment of Clerk's cost by the petitioner.

The suit was then discontinued on the same day by consent of both parties.

SAM'L MADDOX,
H. PRESCOTT GATLEY,
Counsel for Appellee.
WM. G. JOHNSON,
Counsel for Appellant.

[Endorsed:] No. 2015. October term. Smoot vs. Heyl et al. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Dec. 13, 1909. Henry W. Hodge, clerk.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by Their Next Friend, Charles H. Heyl.

WEDNESDAY, *January 5th, A. D.* 1910.

The argument in the above entitled cause was commenced by Mr. W. G. Johnson, attorney for the appellant and was continued by Mr. Samuel Madox, attorney for the appellees, and was concluded by Mr. W. G. Johnson, attorney for the appellant.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by Their Next Friend, Charles H. Heyl.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is an appeal from a decree of the Supreme Court of the District of Columbia in equity enjoining the appellant from maintaining a party wall and commanding the removal of the same. Appellant and appellees are owners of adjoining lots situated on Wyoming avenue, between Twentieth and Twenty-first streets, northwest, in this city. These lots are outside of the original limits of the city of Washington. It appears that appellant erected on his lot a brick dwelling house. The west line of said house, except a portion constituting the west wall of a bay window, was built entirely upon appellant's lot and situated about three feet east of the division line between his lot and that of appellees. The west wall of the bay window was built on the division line between the lots, a portion of the foundation and superstructure of said wall, about one-half the thickness thereof, being extended onto appellees' land. Appellant constructed

said wall under a claim of right to do so by virtue of the building regulations of the District of Columbia. We are of the opinion that this appeal can be disposed of very briefly by the consideration of a single point raised in the brief of counsel for appellee-, namely, "Can the back of the bay window built by the appellant partly on appellees' land be considered a party wall?"

It appears that the portion of the wall which extends onto the property of appellees begins at a point twelve or fifteen feet back from the end of the main wall. It is eight feet long and one story high. The ends of the bay window are not at right angles to the main wall of the building, but are built on an angle in the manner generally used in constructing bay windows. Should the appellees desire to connect with this wall, it appears from the evidence that it would cost as much or more to make the connection than to build a new wall. It also appears that the main wall of appellant's building, which is three feet inside of the west boundary line of his lot, is about forty feet long and thirty feet high. The wall of the bay window in question, therefore, forms no part of the main wall of the house. It could serve no such purpose to appellees as is contemplated by the regulations of the District authorizing the construction of party walls.

What is known as a party building wall had no existence at common law. As said by Mr. Justice Cox, in Fowler v. Saks, 18 D. C., 570: "What we understand now by a party wall had no existence at common law, except by convention between conterminous proprietors. A man had no right to enter upon and occupy a part of his neighbor's land for his own convenience or for any purpose whatever without his consent. The privilege or easement, as we call it, giving to a builder the right of erecting a division wall between himself and his neighbor, partly upon his neighbor's land, is, therefore, purely the creature of legislation." The servitude thus imposed is one created by statute, and, as it contemplates the taking and permanent occupation of a portion of the land of a servient owner, it must be strictly construed.

A strong intimation of what is essential to constitute a party wall under the regulations in force in the District of Columbia is found in Corcoran v. Nailor, 6 Mack., 580, where Mr. Justice James, discussing the right of the servient owner to compel the dominant owner to close spaces left in a party wall, said: "This servitude, imposed in invitum, is to be construed with the utmost strictness. It renders the occupation of another's land lawful only when the wall with which it is occupied satisfies the reason and purpose for which the easement was imposed. The servient owner is compelled to submit to the burden only on the ground that the thing imposed is, in contemplation of law, a benefit equally to him and to the dominant owner; in other words, that it at once stands ready for his enjoyment for all the purposes for which a party wall is intended to serve. These purposes include several uses. It is intended, in the first place, to serve for the support, at any point, of the beams which the servient owner may reasonably have occasion to insert in a supporting wall. This forbids the construction of openings where

beams can not be inserted and support can not be afforded. In the next place, it is intended to serve the purpose of a complete division between adjoining houses. This forbids the construction of spaces in it which do not divide."

The wall here in question, we think, fills none of the requirements of the regulations. Appellees can derive no such benefit from it, as the servient owner is entitled to receive as compensation for the taking and occupation of his land. It constitutes a nuisance rather than a benefit. The record discloses that appellant constructed this wall without authority from the officers of the District. In fact, as shown by the following communications, he proceeded, with full notice from the authorities that his permit to construct his house did not include a permit to construct a party wall:

"WASHINGTON, D. C., *Sept. 14th*, 1905.

"Mr. Snowden Ashford, Inspector of Buildings, Washington, D. C.

"DEAR SIR: Referring to permit for house at 2007 Wyoming ave., N. W., issued Sept. 9th, 1905, will say we wish to have same amended, as follows: In application—Question 17, 'Thickness of party wall.' 'Basement' 18" first floor 13". The plat which accompanied application has been marked opposite party wall as follows:

" 'Distance'—Wall of house at this point is 6½" over line—scale too small to show by rule. Basement wall 9" over.

"The above questions were not answered correctly, in original application, through inadvertence and mistake.

"Please make change in permit, as above, and oblige,

"Yours truly, L. E. SMOOT."

"SEPTEMBER 15, 1905.

"Mr. L. E. Smott, Foot of Third Street S. E., Washington, D. C.

"DEAR SIR: Your communication of September 14th, notifying the office of your change of plan and plat to locate party wall at 2007 Wyoming avenue received, and in reply, beg to say that notice will be filed with the permit with the understanding that the party wall is located on your own responsibility without authority from this office, as I do not, at the present time, locate party walls outside of Florida avenue or Washington city proper.

"Very respectfully, S. ASHFORD,
"Inspector of Buildings."

Since the total failure of appellant to comply with the building regulations is decisive of this case, it is unnecessary to pass upon the question as to whether or not that portion of the building regulations relating to party walls is enforceable in the District outside of the limits of the original city of Washington. The validity of those regulations as applied to the construction of party walls outside of the original city was forcibly assailed by counsel for appellee-, but upon this point we refrain from expressing any opinion.

It may be suggested that appellees have lost none of their rights through laches. They protested in good season against the con-

struction of the wall. Hence neither waiver nor estoppel can be claimed. The decree is affirmed with costs, and it is so ordered.

Affirmed.

No. 2015, January Term, 1910.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by Their Next Friend, Charles H. Heyl.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, *March 1st, A. D.* 1910.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereoy, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL.
March 1, 1910.

Court of Appeals, District of Columbia. Filed Mar. 16, 1910. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia, January Term, 1910.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL et al., Appellees.

Petition of Appellant for Modification of Decree.

Now comes the appellant, Lewis E. Smoot, by his counsel, and, in nowise waiving his claim of lawful right to maintain, as a party wall, the wall in controversy in this case, respectfully moves the court to modify its decree herein, affirming the decree of the court below, which decree of the court below required the removal of all that portion of appellant's west wall which rests upon the land of appellees, and instead thereof to enter a decree modifying the decree of the court below so as to permit the said wall to stand, provided the same be so changed at the ends thereof as to present a flat surface, at right angles with the exterior face of said wall, of the full width and thickness thereof, from which appellants may, if so disposed, continue said wall in length from either end thereof.

WM. G. JOHNSON,
Counsel for Lewis E. Smoot.

Points in Support of Foregoing Petition.

Counsel for appellant respectfully suggests that upon the record in this cause the decree, as entered by the court below, should be modified, rather than affirmed, and respectfully submits the following for consideration by the court:

1. That the only contention of appellees, either in the pleading or evidence, that the wall in controversy does not conform with the building regulations is the fact that the walls connected with it do not join it at right angles, but connect with it on a "splay" or at an angle of forty-five degrees (Rec., pp. 5, 15), and that it would be necessary to cut out angles in these splay walls in order to give a tie to any lengthening or continuation of the party wall, should appellees themselves desire to build a party wall longer than the one erected by appellant (Rec., p. 15). There is not even a pretense made in the bill or evidence that the wall in controversy, to the extent that it exists on appellees' land can not be used by them for any and every purpose for which a party wall may lawfully be used.

2. The wall in question is about eight feet long and eighteen feet high (Rec. plat, p. 12), and that to that extent it is in all respects in conformity with the regulations is not questioned by the bill of complaint.

3. The testimony for the appellees, complainants below shows that it is perfectly practicable, without removing any part of the wall in controversy, to make the ends thereof (the only part of which complaint is made) conform with the requirements of the building regulations, as they contend that the regulations should be construed.

4. It is respectfully submitted that if the wall in controversy conforms with the building regulations except as to some minor feature, capable of rectification, the proper course, if there be a legal right to maintain a party wall at all, is not to require the removal of the entire wall, and to deny the right to maintain one, but is to require that the wall be so modified as to conform with the regulations.

Such was the ruling by the Supreme Court of the District of Columbia in the case of Corcoran vs. Nailor, 6 Mackey, 580, cited with approval by this court in its opinion. In that case the alleged departure from the requirements of the building regulations consisted in maintaining windows or openings in the wall.

Of course the open spaces of the windows would neither serve to support the joists of, nor to enclose or to separate an adjoining building. But the court did not require the removal of the wall for that reason. Mr. Justice James, delivering the opinion of the court in the case, said (pp. 584-5):

"He has a clear right to require that this illegal structure shall be conformed to the law authorizing party walls, and this can be done only by closing these openings, and by doing so in such manner as shall render the filled up spaces suitable for support and for all the purposes contemplated by the right of joint use. To this end, a mandatory injunction is the proper remedy."

It is respectfully submitted that if the decree of the court below can not, in the opinion of this court, properly be reversed, it should be modified as prayed.

WM. G. JOHNSON,
Counsel for Appellant.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by Their Next Friend, Charles H. Heyl.

TUESDAY, *April 5th, A. D.* 1910.

On consideration of the petition for a modification of the decree in the above entitled cause, It is by the Court this day ordered that said petition be, and the same is hereby, denied.

Court of Appeals, District of Columbia. Filed Apr. 12, 1910. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia, April Term, 1910.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL et al., Appellees.

Prayer for Allowance of Appeal.

Affidavits and Brief in Support.

Wm. G. Johnson, Counsel for Appellant.

In the Court of Appeals of the District of Columbia, April Term, 1910.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL et al., Appellees.

Prayer for Allowance of Appeal.

Affidavits and Brief in Support.

Comes now the appellant, Lewis E. Smoot, by his counsel, and prays the court to allow an appeal to the Supreme Court of the

United States from the decree herein affirming the decree of the Supreme Court of the District of Columbia, and respectfully shows to the court that this is a case in which is drawn in question the validity of a statute of and an authority exercised under the United States, and also that the matter in dispute exceeds the sum of five thousand dollars, and, in support thereof, submits the subjoined affidavits and brief.

WM. G. JOHNSON,
Counsel for Appellant.

Affidavits on Question of Value.

[Originals Filed.]

In the Court of Appeals of the District of Columbia.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL et al., Appellees.

THOMAS J. D. FULLER, being duly sworn, deposes and says:

That he is an architect, regularly engaged in that profession in the city of Washington, and has been so engaged for seventeen years. That he designed and supervised the construction of premises No. 2007 Wyoming avenue, in the city of Washington, the property involved in this suit. That the west wall of said building, which rests in part upon the land of the appellees, is so constructed that the portion resting on their land can not be sheared off or otherwise removed without removing the entire projection of which this west wall is a part. The brickwork is laid in the Flemish bond, in which every alternate brick is what is known as a header and is laid transversely across the wall, instead of longitudinally with it. For this reason the portion which projects over on appellees' land can not be cut off without breaking the rest of the wall, and in addition to this mechanical feature the portion to be removed is not accessible and could not be gotten at without removing the other portion. The openings for windows in the sidewalls of the projection connecting with this west wall are of such dimensions and so placed that when the entire west wall is removed, it could not be rebuilt within the lines of appellant's land without tearing out and rebuilding the side-walls of the projection also. The removal of the wall complained of as a matter of mechanical construction necessarily involves the tearing down of the entire projection of the building on the west side. In order to remove the wall complained of and to re-enclose the house three methods only are practicable, as follows:

(1) The entire projection can be removed and the house re-enclosed by a continuous straight wall without projection of any kind. This would entirely destroy the sym-etry, proportions, and di-

mensions of the house, inside and out, and reduce the area of the principal rooms by approximately sixty square feet each.

(2) A projection can be retained on the existing lines, but the change can be effected only by tearing down the entire projection and rebuilding it wholly within the line of appellant's land in which case it must be rebuilt within a reduced depth so as to have the outer face of the footings of the new wall wholly within appellant's land. If the projection be rebuilt on existing lines, but with such required reduced depth the following consequences will ensue and can not be avoided:

(*a*) The use of the deck on the top of the projection will be greatly impaired by reason of the contracted space, being now barely sufficient.

(*b*) The use of the billiard room, as such, will be seriously impaired, if not destroyed, by reason of the reduced width.

(*c*) The change will destroy the sym-etry of proportion of exterior and interior, besides reducing the area.

(*d*) It will give an obvious patched and altered appearance to the house, as the change can not be affected without showing that it has been changed and changed for the worse.

(*e*) In the north and south walls of this projection, as now built, there are openings for windows in the library two and a half feet wide and in the billiard room two feet eleven inches wide. In rebuilding this projection wholly within appellant's land, these windows must be eliminated, because the line at which the west wall would join the side-walls, making the necessary provision for supporting piers, would leave only sixteen inches in width for a window. This space would be unsightly and practically useless.

(3) If some other plan be pursued with a projection designed on different lines the expense of the change would be greater as it would involve the removal and rebuilding of portions of the walls from which the projection springs, while the unavoidable consequences of reduced depth would not be obviated.

To prosecute the work upon any plan will practically prevent the use of the west portion of the house, which includes its principal rooms, during the progress of the work. The change in whatever mode pursued, will be obvious, as the house was designed, proportioned, and constructed with reference to the existing lines, and the projection in question constitutes practically the western portion of the rooms, of which it is an important part.

Attached hereto are estimates of W. P. Lipscomb & Co. for tearing down and rebuilding the projection upon existing lines, but within the line of appellant's lot, and of R. W. and J. B. Henderson, who did the decorations, for restoring the decorations and finish. These estimates are fair and reasonable in sum for the work which would be required.

THOMAS J. D. FULLER.

Subscribed and sworn to before me this 8th day of April, 1910.

J. WM. REILY,
Notary Public, D. C.

(*Bids for Work Annexed and Referred to in Fullre's Affidavit.*)

Office of Wm. P. Lipscomb & Co., Contractors and Builders, No. 1405 F Street N. W.

WASHINGTON, D. C., *March* 9, 1910.

Mr. T. D. J. Fuller, 806 17th Street N. W., City.

DEAR SIR: Our estimate to pull down present West bay window of Mr. Smoot's residence, 2007 Wyoming ave. N. W., and rebuild same is fifteen hundred dollars ($1500.00).

Yours truly, WM. P. LIPSCOMB & CO.

R. W. & J. B. Henderson, Inc., Decorators & Furnishers, 1109 F Street, Through to 1108 G St. N. W.

WASHINGTON, D. C., *March* 9, 1910.

Mrs. L. E. Smoot, 2007 Wyoming Avenue, City.

DEAR MADAM: We beg to hand you the following estimate for repairs to library and billiard room, made necessary providing changes are made in bay window.

Decorating ceilings and side walls of library; alterations to book cases, alterations to beams in ceiling; refinishing floor; refinishing book-cases and beams, made necessary by alterations; papering ceiling and side walls of billiard room; alterations to window seat; painting woodwork and refinishing floor of billiard room; remaking cushion to window seat, completing all work will cost the sum of Four Hundred and Ten Dollars ($410.00).

Trusting to be favored with your esteemed order, we are,

Very truly yours,

R. W. & J. B. HENDERSON, INC.

EDGAR S. KENNEDY, being duly sworn, deposes and says:

That he is the president of the Kennedy & Davis Company, a body corporate, engaged in the construction and sale of dwelling houses and other buildings in the city of Washington, District of Columbia. That he has been engaged in the business of building and selling houses for twenty-five years and has had a large and varied experience in the business, and that for the last year the operations of the company have embraced the construction and sale of houses of an aggregate value of about $300,000. That he is familiar with the construction and sale of higher class dwellings, such as premises No. 2007 Wyoming avenue, the property of the appellant, Lewis E. Smoot, involved in these proceedings. That he has examined the said house and noted the style and character of construction, and especially the portion embraced in the projection on the west side of said house, the west wall of which projection rests in part upon the land of the appellees. That by reason of the construction of this projection, its form and dimensions, the portion of the west

wall which rests upon appellees' land can not be removed without tearing down the entire wall and parts of the connecting side walls, and it is not practicable to tear down the west wall and rebuild the same wholly upon appellant's land without tearing down and rebuilding the entire projection. That said west wall is essential to the use of the house, and if removed, unless some other form of enclosure be substituted for said wall, the entire house would be useless and its value be entirely destroyed. That to enclose said house after removing the said wall it will be necessary either to build a new projection on different lines from the existing ones, or to build a straight wall across the opening without any projection. Either form of enclosure of the house will destroy the existing form, proportions and model of the house, as well as reduce its interior and exterior dimensions, and the work will necessarily give the house an obviously altered and patched appearance, which can not be avoided. That whatever mode is adopted to remove the existing wall and reenclose the building will depreciate the actual sale value of the house by the sum of at least three thousand five hundred dollars, entirely exclusive of the cost of the necessary work and material involved in the tearing down and restoration, and exclusive of the value of the ground.

EDGAR S. KENNEDY.

Subscribed and sworn to before me this 12th day of March, A. D. 1910.

J. WM. REILY,
Notary Public, D. C.

WILLIAM A. HILL, being duly sworn, deposes and says:

That he is a real estate broker in the city of Washington, and has been actively engaged in that business for fifteen years; that he is a member of the corporation known as Moore & Hill, which is and has actively been engaged since its incorporation in the real estate brokerage business; that for the past four years he has been president of the corporation.

Affiant further says that he has been very actively engaged in the purchase and sale of real property of all classes, including high class properties, such as premises No. 2007 Wyoming avenue, the property of Lewis E. Smoot. That he has examined said house and noted the style and dimensions of the same and especially the principal rooms of said house located on the west side thereof and of which the projection involved in this litigation is a part. That he has read the affidavit of the architect, Thomas J. D. Fuller, executed on the 8th day of April, and hereto annexed, describing the physical effect upon said property of the removal of the west wall of said projection and of the re-enclosure and restoration of that part of the house. In the opinion of this affiant, the alterations in said building as described in the affidavit of said Fuller will seriously depreciate the actual sale value of said house in the sum of at least three thousand five hundred dollars, entirely exclusive of the cost of the necessary work and material involved in

the tearing down and restoration of the projection and entirely exclusive of the value of the land.

WM. A. HILL.

Subscribed and sworn to before me this eleventh day of April, 1910.

J. WM. REILY,
Notary Public, D. C.

LEWIS E. SMOOT, being duly sworn, deposes and says:

That he is the appellant in this cause; that the house No. 2007 Wyoming avenue involved in these proceedings cost to build exclusive of the land more than twenty-seven thousand dollars, and as it stands is worth, exclusive of the land, at least that sum. That the billiard room and library in said house are designed and constructed with the western side forming a semi-hexagon, containing an area of floor space of about sixty square feet each in addition to the square of the room, and that the projection of the building on the west, the western wall of which is the subject of the litigation in these proceedings, constitutes that hexagonal portion of said rooms. That the portion of the west wall adjudged by the decree herein to be removed, can not be removed without tearing down the entire wall, which would leave the building unenclosed and exposed to the elements by an aperture eight feet wide and two stories high, and unless a new wall is built or the house re-enclosed in some way, the tearing down of the wall will destroy the entire use of the house and render it valueless. That if, to avoid this consequence and to reduce the damage as much as possible, the house be re-enclosed so as to render it habitable, such re-enclosure can only be accomplished by first tearing down the entire semi-hexagonal portion of the walls and rebuilding other enclosing walls in such position that the same from foundation footings up will fall within the line of appellant's land. That he has made inquiry as to the cost and damage incident to such work and files herewith the affidavit of Thomas J. D. Fuller, the architect who designed and superintended the construction of the house, as to the necessary structural changes and physical effect thereof and the estimates of W. P. Lipscomb & Co., builders, and of the R. W. & J. B. Henderson Co., as to the cost of doing the work and also other affidavits showing the amount of damage which will necessarily result to the value of the building from complying with the decree herein, even if the house be re-enclosed after removing the wall, to avoid total loss, and that the amount of such damage exceeds the sum of five thousand dollars.

LEWIS E. SMOOT.

Subscribed and sworn to before me this 11th day of April, 1910.

MARTIN L. WELFLEY,
Notary Public, D. C.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL, EDWARD RANDOLPH HEYL, HELEN HEYL, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by Their Next Friend, Charles H. Heyl.

THURSDAY, *May 26th, A. D.* 1910.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said motion be and the same is hereby denied.

To the Honorable Wm. R. Day, Associate Justice of the Supreme Court of the United States:

The petition of Lewis E. Smoot, for the allowance of an appeal to the Supreme Court of the United States from a final decree of the Court of Appeals of the District of Columbia, in a cause therein wherein he is appellant and Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by their next friend, Charles H. Heyl, are appellees, being No. 2015 of the Dockets of said Court of Appeals, respectfully shows:

That the decree sought to be reviewed by the appeal prayed for is a final decree rendered March first, 1910, affirming a final decree of the Supreme Court of the District of Columbia, awarding a mandatory injunction, requiring petitioner to remove a portion of an outside enclosing wall of petitioner's residence which rests in part upon the adjacent land of appellees, and perpetually enjoining petitioner from maintaining the same (Rec., 37);

That he is advised that he is of right entitled to said appeal because the case in which said decree is rendered is one in which the validity of a statute of and an authority exercised under the United States is drawn in question and that the matter in dispute exceeds the sum of five thousand dollars.

That he duly filed a petition for allowance of said appeal in the said Court of Appeals but the same was denied by the said Court on May 26, 1910.

The proceeding was begun by bill in equity against the petitioner, wherein the appellees prayed for a mandatory injunction against this defendant to compel him to tear down and remove a portion of the west wall of petitioner's dwelling house, situate on Wyoming Avenue, in the District of Columbia, but without the limits of the original City of Washington, which said wall rests in part upon the land of appellees. Said wall was so built by petitioner under claim of right to do so, by virtue of a building regulation promulgated by the Commissioners of the District of Columbia, under the authority of the Act of Congress, approved June 14, 1878, (20 Stat. p. 131) which authorizes the Commissioners "to make and enforce * * * all such building regulations for said District as they may deem advisable."

The regulation made in pursuance of the statute in providing for party-walls between adjoining owners, authorizes owners of adjacent land to build external enclosing walls of buildings as party-walls and to lay the same equally on the adjacent lands. This regulation is set forth in extenso in petitioner's brief, p. 2, filed herewith.

The validity of the authority exercised under the United States by virtue of said building regulation, and of the statute of the United States authorizing it, were drawn in question in said case, in express terms, by the bill of complaint, wherein it is averred, inter alia, as follows: (par. 10, Rec. p. 5)

"Your complainants are further advised, and therefore aver, that said section 62 was never intended to have any force or effect outside of the territorial limits of the City of Washington, and was never intended to apply to lands lying in the County of Washington, in said District; and that, if it was intended to have such force, effect and application, the said regulation is unconstitutional and void because its effect is to deprive your complainants of their property without due process of law and just compensation."

This petitioner, in his answer justified his right to erect and maintain said wall under the authority of said regulation and Act of Congress, (Ans. par. 7, Rec. p. 8) so that the validity of said authority and Act of Congress, as sole justification for constructing said wall, were denied by complainants and affirmed by defendants, and the validity of the said authority and Act of Congress were thereby drawn in question in said case.

The decree of the Supreme Court of the District of Columbia denied petitioner's right to maintain the wall (Rec. 37) and in an opinion filed by Justice Wright who heard the case, the building regulation was held to be invalid (Rec. 36-7).

The Court of Appeals, by its judgment affirmed this decree, but in its opinion did not pass upon the validity of the authority or the statute, holding that the wall in controversy was not a party wall within the building regulation and that it was therefore unnecessary to pass upon the validity of the regulation. (Wash. Law Rep. Vol. 38, No. 14, p. 218).

The record in the case did not disclose the amount or value of the matter in dispute and with the petition for allowance of an appeal, petitioner filed affidavits of the architect who designed and supervised the construction of the house, as to the physical character of the changes, requisite to comply with the decree; of builders as to the cost of the work, and of real estate experts as to the resultant damage to the value of the house, showing an aggregate amount of over $5000. copy of all which is herewith presented.

Appellees opposed the allowance of the appeal filing a brief, copy of which is herewith presented, but filed no affidavits and the only sworn statements as to the value of the matter in dispute are those offered by petitioner.

Your petitioner therefore prays, that an appeal be allowed to the Supreme Court of the United States from the said final decree of the Court of Appeals of the District of Columbia, and that your honor will fix the amount of the penalty of the appeal bond to

operate as a supersedeas and petitioner presents herewith an assignment of errors against the said decree of the Court of Appeals.

LEWIS E. SMOOT,
By W. G. JOHNSON,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Wm. G. Johnson, being duly sworn deposes and says that he is the counsel for Lewis E. Smoot, the petitioner in the above petition. That he conducted the case of the petitioner in the two courts below and is fully informed as to the said proceedings and that the matters of fact stated in said petition are true.

W. G. JOHNSON.

Subscribed and sworn to before me, a notary public, in and for the District of Columbia, this 27th day of May, 1910.

[NOTARIAL SEAL.] WALTER C. ENGLISH.

Appeal allowed. Bond fixed at $1000.

WILLIAM R. DAY,
A. J. U. S. Supreme Court.

May 28, 1910.

(Endorsed:) No. 2015. Lewis E. Smoot, Appellant, vs. Julia Turner Heyl et al. Petition for allowance of appeal to Supreme Court U. S. and Order of Associate Justice Wm. R. Day allowing same and fixing bond. Court of Appeals, District of Columbia. Filed May 31, 1910. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 2015.

LEWIS E. SMOOT, Appellant,
vs.
JULIA TURNER HEYL et al., Appellees.

Lewis E. Smoot, petitioner for appeal from the final decree entered in said cause on March 1, 1910, assigns as error by the Court, the following:

1. The Court erred in enjoining the maintenance of the wall in controversy in said cause.
2. The Court erred in requiring the removal of said wall, or of any part thereof.
3. The Court erred in holding that said wall did not conform *with* the requirements of the building regulations of the District of Columbia.

4. Even if said wall were not in strict conformity with said building regulations, the Court erred in not permitting the appellant to conform said wall to said regulations in such respect as it varied therefrom, instead of requiring the removal thereof.

5. The Court erred in affirming the judgment and decree of the Supreme Court of the District of Columbia.

LEWIS E. SMOOT,
By W. G. JOHNSON,
His Counsel.

(Endorsed:) No. 2015. Lewis E. Smoot, Appellant, vs. Julia Turner Heyl, et al. Assignment of errors on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 31, 1910. Henry W. Hodges, Clerk.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Lewis E. Smoot, as principal, and The Ætna Indemnity Company, of Hartford, Conn., as surety, are held and firmly bound unto Julia Turner Heyl, Edward Randolph Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl and Helen Heyl in the full and just sum of one thousand dollars, to be paid to the said Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of May, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by their next friend, Charles H. Heyl and the above bounden Lewis E. Smoot a decree was rendered against the said Lewis E. Smoot and the said Lewis E. Smoot having prayed an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Heyl citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Lewis E. Smoot shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

LEWIS E. SMOOT. [SEAL.]
THE ÆTNA INDEMNITY COMPANY, [SEAL.]
By JOHN T. CHESLEY, *Res. Vice Pres.* [SEAL.]

Attest:

M. E. MERSHEIMER, *Res. Ass't Sec'y.* [SEAL.]

[Seal of The Ætna Indemnity Company.]

Sealed and delivered in presence of—
W. G. JOHNSON.

Approved by—

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 2015. Lewis E. Smoot, Appellant, vs. Julia Turner Heyl, et al. Bond on Appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 31, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by their next friend, Charles H. Heyl, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia wherein Lewis E. Smoot is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand nine hundred and ten.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Service of the above citation accepted.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 31, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 66 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Lewis E. Smoot, Appellant, vs. Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by their next friend Charles H. Heyl, No. 2015, April Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 31st day of May, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,234. District of Columbia Court of Appeals. Term No. 329. Lewis E. Smoot, appellant, vs. Julia Turner Heyl, Edward Randolph Heyl, Helen Heyl, Charles Heath Heyl, Jr., and Delphine Turner Heyl, by their next friend, Charles H. Heyl. Filed June 21st, 1910. File No. 22,234.

Office Supreme Court, U. S.
FILED.
NOV 16 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 85.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL ET AL., APPELLEES.

Brief for Appellant in Opposition to Motion to Dismiss.

WM. G. JOHNSON,
Counsel for Appellant.

LAW REPORTER PRINTING CO., PRINTERS AND STATIONERS, 519 FIFTH ST. N. W.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 85.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL ET AL., APPELLEES.

Brief for Appellant in Opposition to Motion to Dismiss.

Statement.

This is an appeal from a final decree of the Court of Appeals of the District of Columbia entered March 1, 1910 (Rec., p. 43), affirming a decree of the Supreme Court of the District of Columbia awarding a mandatory injunction against the appellant requiring him to remove a portion of the west wall of his dwelling house (Rec., p. 37).

The decree appealed from having been entered March 1, 1910 (Rec., p. 43), the right of appeal to this court is controlled by the statute then in force, being section

233 of the Code of Law for the District of Columbia, which provides that:

> "Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, . . . and also in cases, without regard to the sum or value of the matter in dispute . . . in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

On April 10, 1910, the appellant prayed the Court of Appeals to allow an appeal to this court (Rec., pp. 45-50), which the Court of Appeals denied, May 26, 1910 (Rec., p. 51). Thereupon, appellant presented his petition for allowance of an appeal to Mr. Justice Day (Rec., pp. 51-53), and this appeal was allowed by him on May 28, 1910 (Rec., p. 53), the bond approved and citation issued the same day (Rec., p. 55), and service of the citation acknowledged May 31, 1910 (Rec., p. 55). The transcript of record was filed in this court June 21, 1910 (Rec., p. 56), and the present motion to dismiss was made October 28, 1912 (Motion to Dismiss p. 2). The grounds of the petition for allowance of appeal, upon which Mr. Justice Day allowed the appeal are (1) that the validity of an authority exercised under the United States, by virtue of a building regulation and of a statute of the United States authorizing it were drawn in question in the case, by the bill of complaint, and (2) that the value of the matter in dispute, exclusive of costs, exceeds the sum of $5,000 (Rec., p. 52).

ARGUMENT.

It is respectfully submitted that this court has jurisdiction of the cause because (1) it is one in which is drawn in question the validity of a statute of, and an authority exercised under, the United States, and (2) because the matter in dispute, exclusive of costs, exceeds the sum of $5,000.

I.

The Validity of a Statute of, and an Authority Exercised Under, the United States, Were Drawn in Question.

The purpose of the bill was to enjoin the appellant from maintaining a certain wall which rests, in part, upon appellees' land, and the bill alleges (par. 7, Rec., p. 3) that appellant—

> "pretends that he has the right to construct said bay-window under the provisions of section 62 of the Building Regulations of the District of Columbia."

The bill also alleges (par. 9, Rec., p. 4), that the Commissioners of the District of Columbia had promulgated said Building Regulations "among them being said section 62," "under and by virtue of an act of Congress, approved on the 14th day of June, 1878," authorizing the Commissioners to make and enforce building regulations.

The answer admits that the wall in question is, in part, on the land of the appellees and avers that it—

> "is properly placed in part upon the land of complainants, under said regulations duly promulgated by the Commissioners of the District under authority of an act of Congress" (par. 7, Rec., p. 8).

It it thus seen that the bill alleges that the wall in dispute is built under pretense of the authority of a building regulation made under authority of an act of Congress and the answer justifies the alleged trespass under that authority and act of Congress.

In the brief for appellees upon the motion to dismiss counsel for appellees, has, it is respectfully submitted, fallen into error. It is stated in the brief (Brief, p. 7) that:

> "The right of appeal is predicated of two propositions: (1) That in the decision of the Court of Appeals the validity of an authority exercised under United States and of a statute of the United States is called in question."

And the brief adds that:

> "With regard to the first proposition it is only necessary to say that the appellees in their bill did not challenge or assail the validity of any law of Congress."

These statements are incorrect both as to the basis of the appellant's claim of right of appeal and as to the allegations of the bill. Appellant does not claim that the Court of Appeals *in its decision* (opinion or decree) passed upon the validity of any authority exercised under the United States or of any statute of the United States. The right of appeal, however, is not dependent upon what the Court of Appeals *decided* or *how* it decided it, but upon what was drawn in question *by the case*; that is, by the pleadings, proofs, or contentions of the parties, and this is the distinction pointed out by the decisions of this court.

In the case of the B. & P. R. R. *vs.* Hopkins, 130 U. S., 210, Mr. Chief Justice Fuller, construing identical language in the act of Congress giving a right of ap-

peal from a decree of the Supreme Court of the District of Columbia, said (p. 222):

> "When the validity of a statute of, or authority exercised under, the United States is drawn in question in a State court, the decision of the latter must be against its validity in order to justify a review of such decision, but under this act *it is sufficient if the validity is drawn in question* irrespective of the conclusion reached. So that the inquiry is confined to *whether the validity of such a statute or authority is actually controverted.*"

It is not the province of courts, either in their judgments or opinions to make controversies, but rather to end them. The parties make the controversy and bring it to the courts for settlement, and in that case this court points out that *neither party* controverted the *validity* of the statute or authority set up, either by pleadings or instructions asked from the court, but merely contested the interpretation or construction of them.

In the case of Steinmetz *vs.* Allen, 192 U. S., 543, on writ of error under this same statute (then sec. 8 of the act of February 9, 1893), a motion was made to dismiss for want of jurisdiction. Mr. Justice McKenna, delivering the opinion of this court, says (pp. 555-6):

> "Jurisdiction is claimed under the clause of section 8 of the act of February 9, 1893, which gives an appeal to this court from the final judgment or decree of the Court of Appeals in cases in which there is drawn in question the validity of 'an authority exercised under the United States.'"

He then reviews the provision of the statute under which the Commissioner of Patents is authorized to

make regulations, including the rule in controversy and says (p. 556):

> "In other words, it became an authority to those officers, and, necessarily, an authority 'under the United States.' *Its validity was and is assailed by the plaintiff in error.* We think, therefore, we have jurisdiction, and the motion to dismiss is denied."

It is to be observed here that this court in disposing of the question of jurisdiction makes no reference to the judgment or opinion of the court below upon the validity of the authority involved, but founds its jurisdiction upon the fact that "its validity was and is assailed *by the plaintiff in error.*" If it were necessary to the jurisdiction of this court in that case that the court below, in its opinion, should have passed upon the validity of the authority, this court would certainly have referred to that opinion instead of founding its jurisdiction solely upon the fact that the plaintiff in error had assailed its validity.

So, in the case of South Carolina *vs.* Seymour, 153 U. S., 353, in which this court, on motion, dismissed the writ for want of jurisdiction, Mr. Justice Gray said (p. 360):

> "In the present case, no objection to the validity of the act of Congress under which the Commissioner of Patents acted was made, either at the hearings in the Patent Office and in the courts of the District of Columbia, or in the briefs filed by counsel in this court. Nor was the existence or the lawfulness of the authority conferred by that act upon the Commissioner of Patents drawn in question."

Here, again, it is seen that this court refers to and examines the *acts of the parties*, to see what kind of a controversy they made and not the opinion of the court

to see how it regarded that controversy in reaching its judgment.

So, in the case of McLean *vs.* Denver & Rio Grande R. R. Co., 203 U. S., 38, this court, by Mr. Justice Day, says (pp. 47-8):

> "An objection is made to the jurisdiction of this court upon the ground that the case is not appealable under the act of Congress of March 3, 1885. 23 Stat., 443.
>
> "Section 1 of the act provides, in substance, that no appeal or writ of error shall be allowed from any judgment or decree of the Supreme Court of a Territory unless the matter in dispute, exclusive of costs, exceeds the sum of $5,000. Section 2 of the act makes exception to the application of section 1 as to the sum in dispute, in cases wherein is involved the validity of a treaty or statute of, or authority exercised under, the United States, and in all such cases an appeal or writ of error will lie without regard to the sum or value in dispute.
>
> "Confessedly, $5,000 is not involved; and in order to be appealable to this court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This court, in the case of Lynch *vs.* United States, 137 U. S., 280, 285, laid down the test of the right to appeal under the statute in the following terms:
>
> " 'The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied . and the denial forms the subject of direct inquiry.'
>
> "The right to legislate in the Territories is conferred, under constitutional authority, by the Congress of the United States and the passage of a territorial law is the exertion of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the territorial legislature, it is contended by the relators below, appellants

> here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the Territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the Territory. In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the Territory, as was the fact in Snow *vs.* United States, 118 U. S., 346. The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject-matter in controversy, and brings the case in this aspect within the second section of the act."

Counsel for appellees, it is respectfully submitted, is, therefore, in error in assuming that the appellant does or must found his claim of right of appeal upon how the court decided the controversy. The real question is, *What was drawn in question in the case*? If the validity of an authority under, or Statute of, the United States was drawn in question in the case, it makes no difference for the purposes of the jurisdiction of this court how the court below decided that controversy or whether it decided it at all. It is the *existence* of the question *in the case* and not its *disposition*, by the judgment or opinion, which gives jurisdiction to this court.

While it is true that appellees, in their bill, did not directly and in express terms "challenge or assail the validity of any law of Congress" yet they did in express terms challenge and assail an authority exercised under the United States, to wit, a building regulation made

under an act of Congress expressly authorizing it, and, by consequence, inevitably, the act of Congress itself. The bill, it is true, denies that the building regulation in question was intended to have any effect in that part of the District outside the limits of the original city of Washington. But the appellees realized the doubtfulness of that proposition for the following reasons.

The act of Congress of June 14, 1878, provides that:

> "The Commissioners of the District of Columbia be and they are hereby authorized and directed to make and enforce . . . all such building regulations *for said District* as they may deem advisable" (20 Stat., p. 131).

The act therefore is comprehensive and without limitation as to geographical extent, contains no reference to the *city*, and uses the words "said District," as expressing the area within which the regulations shall have effect.

In the regulations themselves, as promulgated on March 1, 1902, the Commissioners ordered that—

> "the following are hereby made and promulgated as the building regulations of the *District of Columbia*, and shall control the construction, erection, maintenance, repair and removal of all buildings, as defined in these regulations, *and their appurtenances, within the District of Columbia.*"

The general prevalence of this view of the regulation, and the gravity of the question is shown by the appellees' own witness, Ashford, the Inspector of Buildings, who testifies that *four thousand houses* with such party walls resting partly on both lots have been built outside the original city limits while he was inspector or assistant inspector. Under these conditions the appellees did not confine themselves to the contention that the

regulation did not apply to the part of the District outside the original city of Washington, but also alleged as follows (par. 10, Rec., p. 5):

> "If it was intended to have such force, effect, and application, *the said regulation is unconstitutional and void* because its effect is to deprive your complainants of their property without due process of law and just compensation."

The objectionable part of the regulation is set out in the bill (par. 7, Rec., p. 3) and provides that the foundations of party walls "shall be laid equally upon the lands of the persons between whom such party walls are to be built," and it is this which the bill alleges to be unconstitutional and void. Not only does the bill allege the invalidity of this authority, but the trial judge, in his opinion, held it to be invalid (Rec., pp. 36-7).

As before shown, the bill alleges that the regulation in question was made "under and by virtue of the act of Congress approved the 14th day of June, 1878" (par. 9, Rec., p. 4), so that the alleged unconstitutionality of the regulation applies as well to the act of Congress authorizing it as to the regulation itself. In any event, the regulation is admittedly an "authority under the United States," and its validity is distinctly drawn in question and denied by the bill and by the opinion of the trial court. The unconstitutionality of this building regulation was also insisted upon in the Court of Appeals in the brief for appellees. The position of the appellees therefore is this: Having in the bill drawn in question the validity of this authority exercised under the United States by alleging the unconstitutionality of the regulation and obtained a decree on that ground; having insisted upon its invalidity in the Court of Appeals, they now deny that the validity of the authority is drawn in question merely because the Court of Appeals affirmed

the decree on other grounds; this, it is submitted, can not defeat the jurisdiction of this court under the statute, but is a question relating to the merits.

II.

The Matter in Dispute, Exclusive of Costs, Exceeds the Value of $5,000.

The record in the case did not disclose the money value of the matter in dispute, but the bill, its prayers, the proofs and the decree thereon show what subject-matter was involved. When appellant prayed the court below for allowance of an appeal, affidavits were filed showing the money value of this subject-matter (Rec., pp. 46-50). No counter affidavits were filed by the appellees, although they appeared and filed a brief in opposition to the allowance of the appeal (Rec., p. 52).

In the brief of appellees, on their motion to dismiss, it is stated that no counter affidavits were filed in the court below because "it was not deemed necessary or advisable" (Brief, p. 11). Being now, it would seem, of a different opinion counter affidavits are "deemed necessary or advisable" and are filed in support of the motion to dismiss in an appendix (Brief, pp. 15-19). It is also stated in the brief for appellees that "without notice to appellees, the *ex parte* application was made to one of the justices of this court and an appeal allowed" (Brief, p. 11). The record in this case shows, however (Rec., pp. 51-3), that the application to Mr. Justice Day disclosed all the facts, to-wit: Copies of the affidavits of appellant, of the brief of appellees in opposition to the allowance of appeal (Rec., p. 52), and the fact that the Court of Appeals had, notwithstanding such affidavit, denied the allowance (Rec., p. 52). The justice

of this court was neither deceived nor misled. There was laid before him *all* that was before the Court of Appeals, including appellees' brief in opposition, and *nothing* which was *not* before the Court of Appeals.

Before entering upon the consideration of the affidavits as to the value of the matter in dispute an important fact should be brought to the attention of the court, namely:

Counsel for appellant is authorized by counsel for appellees to state that it is admitted that no one of the affiants, Murray, Parry, or Schneider, ever went inside appellant's house or on his premises, and that no request was ever made for permission for them to do so. Also, that the "estimate" which the affiant, Murray, states that he "submitted" was not submitted to or known by appellant.

This statement is deemed to be important, as, in the opinion of counsel for appellant, the language of the affidavits might convey a contrary impression.

Passing, now, to a consideration of the affidavits themselves, the situation is found to be this.

First, as to the work of tearing down and reconstruction. The affidavits for appellant are to the effect that the exterior work would cost $1,500 (Rec., p. 48), and for the interior work $410 (Rec., p. 48), and Fuller, the architect who designed and supervised the construction of the house, swears that these estimates are fair and reasonable for the work required (Rec., p. 47).

Furthermore the affidavits for appellant specify in detail the work required to be done (Rec., pp. 46-50).

On the other hand, the estimates on the *exterior work, alone,* submitted by appellees, from persons who were never in the house or on the premises are variant; Murray $1,253, Parry $1,500, Schneider $1,400.

Second, as to the physical change in the structure itself.

The affidavit of Fuller, the architect who designed and supervised the construction of the house, states in detail the necessary changes and the reasons therefor (Rec., pp. 46-7).

Important among these is the statement that whereas there are now windows in the north and south walls, in the library two and a half feet wide and in the billiard room two feet eleven inches wide the change would involve a reduction of these windows to a width of only *sixteen inches*, which would be "*unsightly and practically useless*" (Rec., p. 47).

The affiants in behalf of appellees express a different opinion, believing that a mode of tearing down and rebuilding could be adopted which would preserve these windows in their original dimensions. Two facts destroy all value of these opinions: First, they are not founded upon a physical examination of the building to be remodeled; second, they contemplate *not* doing what the decree requires shall be done.

Each one of appellees' affiants bases his opinion upon the theory that the only thing required by the decree is the removal of so much of the *brick wall above ground as projects about six and one-half inches over the line* (Appellees' Appendix, p. 15, Murray; p. 16, Parry; pp. 18-19, Schneider). An examination of the bill, evidence, and decree will show that the appellees do not confine themselves to any such limit. They object to all intrusion over the dividing line, whether above or below ground, and in that the decree sustains them with all its consequences.

The bill alleges (par. 6, Rec., p. 3) that—

> "*the foundation walls* of said bay-window have been laid and the windows partially erected."

The bill further alleges (par. 7, Rec., p. 3) that this is

being done under color of the alleged unlawful building regulation which provides that the—

> "*foundation shall be laid equally* upon the lands of the persons between whom such party walls are to be built,"

and that appellant—

> "procured the surveyor of said District, against the protest of your complainants, to enter upon their said land, and *set out the foundations* of the intended west line of said bay-window, *equally upon the land of your complainants* and the defendant's own land."

And the same paragraph alleges (Rec., p. 4) that—

> "the said proposed wall . . . is eighteen inches thick at the bottom," etc.

The bill further alleges (par. 8, Rec., p. 4) that appellees' lands are not subject to the said building regulation, so that it is seen the bill complains of the entire structure, *from foundation up*, so far as it intrudes within the appellees' land. And the second prayer of the bill prays that the appellant be required to remove so much of the wall "as projects over and upon the lands of the complainants" (Rec., p. 6).

By reference to the testimony of appellees which is not controverted in the record, it will be seen that the physical situation is as follows (Rec., p. 11).

The supposed trespass consists of a concrete footing two feet six inches wide on which the foundation wall is centered; upon this a brick wall eighteen inches thick going up to grade; then a granite base and above that a marble water-table and upon that the thirteen-inch wall. So that while the brick wall extends over the line only six and one half inches, the foundation, laid not quite equally upon the two lots, according to the witness, intrudes upon the appellees' land fourteen

inches (Rec., p. 12). It is this entire structure which the bill seeks to have removed and which the decree orders to be removed; for the words are that the defendant—

> "remove so much of said bay-window *as projects over and across the boundary line* between the land of the complainants and said lot of the defendants" (Rec., p. 37).

It is therefore plain that the decree could not be satisfied by tearing down the superstructure of brick over the marble water-table and rebuilding that six and a half inches east of its present location, but it calls for a removal of the *foundation as well* and requires the rebuilding of it wholly within appellant's line. As the new wall must be centered upon the center of the foundation, it is obvious that when the base two feet six inches thick is placed wholly upon appellant's land the superstructure wall will fall half that distance within appellant's land or *fifteen* inches, more than twice the distance which appellees' affiants use as the basis of their affidavits.

It being admitted that these affidavits are not based upon actual knowledge, from a physical examination of the building, and it being a demonstration that they do not comprehend the changes in the structure required by the decree, it is submitted that they are without evidential value.

Third, as to the diminished value of the building in consequence of the change required by the decree.

As to this question appellant submitted the affidavits of two reputable and experienced expert dealers in residence property of this class, Kennedy & Hill (Rec., pp. 48-50), against which the appellee submits nothing but the comment that "manifestly these figures were suggested by the necessities of the case" (Brief, p. 13).

It is respectfully submitted that there is nothing

in the record to justify the inference that the "necessities of the case" led counsel to procure, or reputable brokers to give, dishonest affidavits on this subject, and the fact that no counter affidavits have been presented leads to the just inference that the able and industrious counsel for appellants did not find equally experienced dealers in real property ready to deny that so radical a change would impair the value of the property to the extent shown by the affidavits for appellants.

It seems proper also to note that if the affidavits as to value were open to contradiction, the appellees had ample opportunity to do so in the court below, when appellant's application for allowance was made and the affidavits in support thereof filed. It was then "not deemed necessary or advisable" to file counter affidavits, and as those in support of the jurisdictional amount stand, even yet, uncontradicted, no good reason can be seen why they should not prevail.

The effort of counsel for appellees to belittle the force of appellants' affidavits is obviously based upon his misconceptions of the facts as to the extent of the injury to the house by the required changes as disclosed by the affidavits for appellee already noticed.

The value of the matter in dispute is not to be measured by the mere value of the existing wall and the cost of tearing down and rebuilding, but must include the direct impairment in the value of the property consequent upon obedience to the decree.

In the case of Cameron *vs.* United States, 148 U. S., 301, the appellant had been decreed to remove a certain wire fence with which it was claimed that he had enclosed some eight hundred acres of land alleged to belong to the United States.

The appeal was originally dismissed for want of jurisdiction, on the ground that the matter in dispute was

not within the jurisdiction of the court (146 U. S., 533). It was subsequently reinstated and the jurisdiction sustained. Mr. Justice Brown, in the later case, speaking of the facts shown in support of jurisdiction, saying, among other things (pp. 303-4):

> "That without such fence the use and control of the enclosed land and water would be of no use to him; that if he had not the ability to maintain the fence, the land and water would be at once seized and appropriated by other persons, and defendant's cattle driven and kept away; that he would be unable to conduct his cattle business in this section; and that the possession, use and occupation of such enclosure exceeds the value of $10,000. These facts make a wholly different showing, and the case is therefore properly before us on its merits."

In determining the value of the matter in dispute the court, in that case, took into consideration the effect upon the appellant's business and property resulting from obedience to the decree as being the measure of value, and not the value of the fence or an intangible or incorporeal right which its maintenance tended to support.

The other matters contained in the brief for appellees appear to counsel to relate to the merits, and will not be discussed, as it is understood this court will not consider the merits upon a motion to dismiss for want of jurisdiction.

It is respectfully submitted that the motion to dismiss should be denied.

WM. G. JOHNSON,
Counsel for Appellant.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 85.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL ET AL., APPELLEES.

Brief for Appellant on the Merits.

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THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

SUBJECT INDEX.

	Page.
Statement	1-3
Assignment of Errors	3
Argument	4-29
I. Building Regulation Throughout the District	4-7
II. Regulation Constitutional and Valid	8-21
III. Wall Complies with Regulations	21-27
IV. Decree Should be Modified if Not Reversed	27-29
Appendix—Extract from Building Regulations Relating to Party Walls.	

List of Cases Cited.

	Page.
Adams *vs.* Van Alstyne, 25 N. Y., 232	11
Brooks *vs.* Allen, 1 Wisc., 114	11
Burr *vs.* Hamer, 12 Neb., 483	11
Carpenter *vs.* Vail, 36 Mich., 226	11
Carrigan *vs.* De Neufbourg, 3 La. Ann., 440	17
Castner *vs.* Riegel, 54 N. J. L., 498	11
C. B. & Q. Ry. *vs.* Drainage Commissioners, 200 U. S., 561	20
Corcoran *vs.* Nailor, 6 Mackey, 580	29
Coster *vs.* Tide Water Co., 18 N. J. Eq., 54, 518	18-19
Cummings *vs.* Brooks, 56 Vt., 308	11
Grief *vs.* Kahn, 87 Ky., 17	11
Hall *vs.* Andrews, 75 Ill., 252	10
Head *vs.* Amoskeag Mfg. Co., 113 U. S., 9	17
Hendricks *vs.* Stark, 37 N. Y., 106	12
Heron *vs* Houston, 217 Pa. St., 1	15
Hewitt *vs.* Jewell, 59 Iowa, 37	10
Hoar *vs.* Hennesy, 29 Mon., 252	11

Page.

Howland *vs.* Howland, 14 R. I., 560 11
Hunt *vs.* Ambruster, 17 N. J. Eq., 208 ..... 14, 15, 19
James *vs.* Tibbetts, 60 Me., 557 11
Kennedy *vs.* Owen, 131 Mass., 587 ..... 11, 19
Kingman *vs.* Williams, 50 Ohio St., 722 11
Larche *vs.* Jackson, 9 Martin, 724 16
Lightfoot *vs.* Grove, 5 Heisk., 473 11
McClay *vs.* Clark, 42 Minn., 363 11
Maudlin *vs.* Hanscombe, 12 Colo., 204 10
Mead *vs.* Watson, 57 Cal., 591 10
Moore *vs.* Levert, 24 Ala., 310 10
Moore *vs.* White, 45 Mo., 206 11
Palmer *vs.* Silverton, 32 Pa. St., 65 11
Perkins *vs.* Boody, 62 N. H., 454 11
Snyder *vs.* Bell, 32 Kans., 230 11
Swift *vs.* Calman, 102 Iowa, 206 13
Tomlinson *vs.* Bainaka, 163 Ind., 112 10
Wilkins *vs.* Jewett, 139 Mass., 29 19
Wright *vs.* Wright, 21 Conn., 329 10
Wurtz *vs.* Hoagland, 114 U. S., 606 18

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Statement.

This is an appeal from a final decree of the Court of Appeals, rendered March 1, 1910 (Rec., p. 43), affirming a decree of the Supreme Court of the District of Columbia requiring the appellant to remove a portion of the west wall of his dwelling-house (Rec., p. 37). The appellees are the owners in fee as tenants in common of a certain parcel of land in that part of the city of Washington, lying outside of the limits of the original city and situate on the north side of Wyoming Avenue between Twentieth and Twenty-first Streets (Rec., p. 2), and the appellant is the owner in fee, in severalty, of the lot immediately adjoining the appellees' land on the eastern side thereof (Rec., p. 3). At the time of the acts complained of in the bill, the land of the appellees was improved by a dwelling-house placed on the westerly side thereof leaving an open space between it and the appellant's land, thirty-two feet wide, which was sown in grass and ornamented with shrubbery, and designed

to furnish light and air, and to add to the beauty of the said dwelling (Rec., p. 2).

In this situation, the appellant proceeded to construct upon his lot a brick dwelling. A portion of the enclosng walls of appellant's dwelling, embracing the basement and first story on the west side, are so constructed as to form a semi-hexagonal area, styled, in the pleadings and evidence, a bay-window, as shown in red lines on the diagram of the entire structure (Rec., p. 24), and in detail, as to this portion of the enclosing walls, in another diagram (Rec., p. 12). The complaint in the bill is that the westernmost portion of this semi-hexagonal enclosing wall projects over the dividing line between the lands of appellant and appellees and rests in part upon appellees' land (Par. 6, Rec., p. 3). The bill alleges (Pars. 7 and 9, Rec., pp. 3-4), and the answer admits (Par. 7, Rec., pp. 7-8), that the said wall is so placed in part on appellees' land under the provisions of Building Regulations promulgated by the Commissioners of the District of Columbia, made and promulgated by them under an act of Congress approved June 14, 1878, assuming to prescribe the location and character of party walls between adjoining owners. The bill denies that appellant has the right to construct said wall in part upon appellees' land because, as it avers; (1) that the Building Regulations relied upon by appellant were not intended to have any force and effect outside the territorial limits of the original city of Washington; (2) that if so intended, the regulations are unconstitutional and void because they deprive appellees of their property without due process of law and just compensation; and (3) that said wall is not a party-wall as defined by the Building Regulations (Pars. 10-11, Rec., p. 5).

The cause was heard upon the pleadings and testimony, and the justice hearing the same held the building regulation to be invalid (Opinion, Rec., pp. 36-7),

and entered a decree enjoining appellant from maintaining the wall in part on the land of appellees and requiring appellant to remove the same (Rec., p. 37). On appeal, the Court of Appeals, affirmed this decree (Rec., p. 43), and in its opinion held that the wall, as constructed, was not a party wall within the requirements of the Building Regulations, and that it was therefore unnecessary to pass upon the validity of the regulations (Rec., pp. 41-2).

Appellant then prayed the Court of Appeals to modify the decree so as to permit appellant to *reform* the wall in the respects in which it was held not to conform with the regulations (Rec., pp. 43-5) which the court denied (Rec., p. 45). Thereupon appellant prayed the allowance of an appeal to this court (Rec., pp. 45-6) which was denied, May 26, 1910 (Rec., p. 51), and an application for allowance of said appeal was thereupon made to Mr. Justice Day (Rec., pp. 51-3), and was allowed by him on May 28, 1910 (Rec., p. 53).

Assignment of Errors.

1. The court erred in enjoining the maintenance of the wall in controversy.

2. The court erred in requiring the removal of the wall or any part thereof.

3. The court erred in holding that the wall in controversy did not conform with the requirements of the Building Regulations of the District of Columbia.

4. Even if the wall were not in strict conformity with the Building Regulations, the court erred in not modifying the decree so as to permit the appellant to make the wall conform with said regulations in such respect as it varied therefrom.

5. The court erred in affirming the decree of the Supreme Court of the District of Columbia (Rec., pp. 53-4).

ARGUMENT.

It is, of course, conceded by appellant, at the outset that unless a valid building regulation, applicable to the location of the properties involved, authorized the construction of a party wall resting in part upon the lands of the adjoining owner, there is nothing in the record to give even colorable right to the structure in question or to take it out of the category of an obvious trespass. It is respectfully submitted that (1) the Building Regulations apply to the territory in question; (2) that they are constitutional and valid; (3) that the wall in controversy is constructed in substantial compliance with the regulations, and (4) that if there be any departure from the regulations, in the construction of the wall the decree should have been modified so as to admit of their correction. These propositions will be discussed in the order above presented.

I.

The Building Regulations Extend to All Lands Within the District of Columbia.

In the rational consideration of this proposition all question as to the *validity* of the regulations must properly be laid aside. The *validity* of the regulations depend upon the authority conferred on the Commissioners by Congress and the power of Congress to confer it. The territorial *extent and scope* of the regulations depend upon the expressed intent of Congress in the act authorizing the regulations and in the expressed purpose of the Commissioners in the regulations themselves.

When the cities of Washington and Georgetown were separate municipal corporations, the legislation of Congress was generally specific in its provisions as

to legislative measures intended to apply to the one or the other. But after those forms of government were abolished and the commission form was adopted for the entire District the powers conferred upon and exercised by the Commissioners were, of necessity, general and comprehensive as to the entire territory of the District subjected to control by the Commissioners under Congress. When, therefore, Congress authorized the making of building regulations and the Commissioners made and promulgated them, no restricted terms were employed by either with respect to the territory in which they were to operate.

The act of Congress of June 14, 1878, provides that:

> "The Commissioners of the District of Columbia be and they are hereby authorized and directed to make and enforce . . . all such building regulations *for said District* as they may deem advisable" (20 Stat., p. 131).

The act therefore is seen to be comprehensive and without limitation as to extent, contains no reference to the city, and uses the words "said District," as expressing the area within which the regulations shall have effect.

In the regulations, as promulgated on March 1, 1902, the Commissioners ordered that—

> "the following are hereby made and promulgated as the building regulations of the District of Columbia, and shall control the construction, erection, maintenance, repair and removal of all buildings, as defined in these regulations, *and their appurtenances, within the District of Columbia.*"

Thus, it is manifest that whatever may be said of their *validity*, as to their geographical *extent*, there can

be no question that, under the act of Congress and the act of the Commissioners, the regulation as to party walls is coextensive with the boundaries of the District.

Not only is this general language used in the act and in the regulations, but it is confidently asserted that nowhere in the regulations, nor in any act of Congress, can any words be found indicating a purpose to limit the regulations to the area of the original city of Washington. Moreover, the record in this case shows through the testimony of appellees' witness that during his official régime over *four thousand* houses have been built, outside the original city, under permits from the District officials under these regulations in which party walls, as provided by these regulations, have been built (Rec., p. 21).

The particular regulations involved in this case are set out in the Building Regulations in the following terms:

"PARTY WALLS.

"Sec. 62. The fourth section of the Building Regulations, No. 1, approved by President Washington October 17, 1791, quoted below, *is recognized as in force, and is published for the information of builders.* The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties:

" 'That the person or persons appointed by the Commissioners to superintend buildings may enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be

reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall, the charge of value thereof to be set by the person or persons so appointed by the Commissioners.'

"Sec. 63. *Provided*, That the maximum thickness laid upon the adjoining lot shall be nine inches in the cellar, and that the set-off shall be equal on both sides, and in all cases where a building is erected and party wall is constructed the party line shall be carefully preserved by receding four and one-half inches from the front with that portion that extends over that line, except in the center of continuous blocks. Party walls will not be permitted in steel or skeleton construction except as provided in section 68, nor of rubble or concrete except as provided in sections 58 and 61, respectively."

In the foregoing introduction to party-wall regulations, it is seen that the Commissioners expressly declare that the first part of the regulation approved by President Washington authorizing the laying of party walls in part on the adjoining lot "*is recognized as in force*," without any qualification or restriction as to any particular locality in the District.

Although this regulation has been in force in the original city for over a century, and by the terms of the Building Regulations since 1878, promulgated as extending to the entire District, and thousands of buildings have been constructed under it *outside* the original city, it is confidently asserted that no decision can be found by any of the courts of this District holding the regulations to be restricted in their operation within the boundaries of the original city.

II.

The Regulation is Constitutional and Valid.

The contention was made in the courts below that section 62 of the Building Regulations is a rescript of the regulation promulgated by President Washington under a power conferred by deed from the original proprietors, and that but for this grant in the deed no such power could have been exercised by him.

This proposition is conceded. The regulation in question, being the exercise of police power, belongs to the legislative department and could not be enacted by the executive. It was only as the grantee of a power to annex conditions to the title to land that the President could make any regulation. He did it as the representative of the owners. But neither he nor the owners could by that act exhaust, restrain, or affect the exercise of the legislative police power of Congress over this District. It remained, therefore, competent for Congress, in the exercise of its police power, to legislate upon this subject, within constitutional limits, without the consent of the property owners. That the Congress has plenary power throughout the entire District is too well established to require argument in its support, and the question presented is, Has Congress the power to make this regulation operative throughout the District, without the aid of a grant from the land owners?

It is well, at the outset, to consider the exact nature and effect of this regulation. It is, in no true sense, a deprivation of property or a taking of one man's land and conferring it upon another. In both urban and rural communities actual use of land by adjoining owners up to the purely imaginary and mathematical line of juncture having length, but neither breadth nor thickness, is neither practical nor possible, and, as party fences become necessary in rural sections, physical separations,

by walls or fences, of adjoining owners in urban communities are obviously even more required. In such cases these physical separations for the common benefit of both adjoiners must either rest equally upon the land of each or be wholly borne by one for the common advantage of both.

The regulation in question, in making necessary rules for buildings, specifies, among other things, the thickness of side walls, and with respect to owners of contiguous lots provides, not that one owner shall have vested in him the property of the other, but that *both* owners shall *reciprocally* enjoy the right to place a division wall equally upon both lots, with the limitation that, above the surface, it shall not extend beyond a fixed limit in inches, giving each owner the equal right to use the wall, and imposing upon neither any part of the expense of the wall unless he uses it, and then only charging such owner with a moiety of the value of so much of the wall as he shall actually use.

Instead, therefore, of being a divestiture of one man's title and a vesting of it in another, it is merely a police regulation conferring reciprocal benefits upon both for the common welfare.

Section 57 of the regulations requires for the public safety that the side walls of houses shall be thirteen inches thick. If no party wall were permitted each proprietor would be compelled to build an independent wall of thirteen inches thickness, so that for each house there would be not only the useless expenditure in the construction of twenty-six inches of wall where thirteen inches would suffice, but there would also be the consequent waste of a strip of thirteen inches of land from the width of each lot.

As heretofore pointed out *over four thousand houses* have been built under this party wall regulation outside the limits of the original city, which shows a general

acquiescence in its validity, justice, and utility, after more than a century's experience within the city.

But for this regulation there would have been a needless *waste of over forty-three hundred front feet of land, or enough to accommodate two hundred and fifteen houses*, of twenty feet each, to say nothing of the wasted cost of useless brickwork.

Law and morality alike abhor waste, and it can not be said that a police regulation which so operates to the absolutely equal benefit of all property owners is void as a deprivation of property.

Laws authorizing and even requiring adjoining owners, in rural communities, to build and maintain division or party fences between their lands are a familiar illustration of the legislative exercise of police power similar to this party-wall regulation. These statutes uniformly direct the building of such fences on the division line, *one-half on the land of each owner*, and provide compulsory process to enforce contribution to the cost by the adjoining owners. So far as counsel has been able to discover, the constitutionality of such statutes has been challenged in but one case (Tomlinson *vs.* Bainaka, 163 Ind., 112), and in that its validity was sustained. The extent to which these statutes exist, are recognized and enforced in the several States is indicated by citations of decisions of the highest courts in twenty-five of the States, set out in the margin.* No difference in legal principle is perceived between a statute authorizing a *party fence* to be built equally upon the lands of adjoining owners and one authorizing a *party wall* to be similarly built.

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*Moore *vs.* Levert, 24 Ala., 310; Mead *vs.* Watson, 57 Cal., 591; Maudlin *vs.* Hanscombe, 12 Colo., 204; Wright *vs.* Wright, 21 Conn., 329; Hall *vs.* Andrews, 75 Ill., 252; Tomlinson *vs.* Bainaka, 163 Ind., 112; Hewett *vs.*

Indeed this party-wall regulation is less onerous than the usual party-fence laws, as the adjoining owner is not compelled to contribute to its cost unless and until he chooses to use it, *as a wall for his own house*, and then only to pay a moiety of the cost of so much of the wall as he actually uses. As a mere physical separation, or fence, he may have the benefit of it indefinitely without any contribution to its cost. Moreover, by section 74 of the regulations, if the party wall built by the first builder be insufficient for the purposes of a subsequent builder on the adjoining lot (as where the second builder erects a much higher building requiring thicker walls) the second builder may tear down the existing wall and rebuild to suit his own purposes, or thicken the existing party wall, by building against it, without paying anything for the existing party wall. The only obligation he assumes being in the event of tearing down the existing party wall, to restore the adjacent building against any damage caused by the tearing down of the party wall.

For the convenience of the court the several regulations relating to party walls are printed in an appendix hereto.

Jewell, 59 Iowa, 37; Snyder *vs.* Bell, 32 Kans., 230; Grief *vs.* Kahn, 87 Ky., 17; James *vs.* Tibbetts, 60 Me., 557; Kennedy *vs.* Owen, 131 Mass., 587; Carpenter *vs.* Vail, 36 Mich., 226; McClay *vs.* Clark, 42 Minn., 363; Moore *vs.* White, 45 Mo., 206; Hoar *vs.* Hennesy, 29 Mon., 253; Burr *vs.* Hamer, 12 Neb., 483; Perkins *vs.* Boody, 62 N. H., 454; Castner *vs.* Riegel, 54 N. J. L., 498; Adams *vs.* Van Alstyne, 25 N. Y., 232; Kingman *vs.* Williams, 50 Ohio St., 722; Palmer *vs.* Silverton, 32 Pa. St., 65; Howland *vs.* Howland, 14 R. I., 560; Lightfoot *vs.* Grove, 5 Heisk., 473; Cummings *vs.* Brook, 56 Vt., 308; Brooks *vs.* Allen, 1 Wisc., 114.

From this brief analysis of the regulations, it is seen that it is entirely erroneous to characterize the regulations as authorizing one man to build his house in part on his neighbor's land. Neither the land of the adjoining owner nor the portion of the wall thereon becomes the property of the builder. The land remains the property of the original owner and he also becomes owner in common, of the *entire* wall, not only of so much as stands on his own land but also of the portion standing on his neighbor's land. It does not differ, therefore, in principle, in any respect, from a party fence, and differs from it in fact only in that it may be jointly used as an enclosing and supporting wall for the houses of the adjoining owners, as well as a physical divisional separation of, or fence between, their lots.

That a party wall, resting in part on the lands of the two adjoiners, irrespective of whether it be so placed by agreement or by statute does not operate, legally, as a deprivation of property or as a burden upon either owner is very clearly reasoned out by the Court of Appeals of New York in the case of Hendricks *vs.* Stark, 37 N. Y., 106.

The case was specific performance to compel the purchase of the property and the vendee objected, on the ground that the property was subject to the servient easement of an overlapping party wall, of which no notice was given at the sale. The court says (p. 110):

> "The practice of economizing space in populous cities, by the erection of buildings with party walls, is one so ancient that it would be difficult to trace its origin. . . ."
>
> "As the title acquired by the defendant extended only to the middle of the eastern and southern party walls, it is obvious that the *mutual* easement for their support was a *benefit, and not a burden*, to him as well as the adjacent

> proprietors. It was a *valuable appurtenant*, which passed with the title to the property, and its value to him was not diminished by the fact that it was equally beneficial to the adjacent owners."

And further the court says (p. 111):

> "It is true that the erection of a party wall creates a community of interest between neighboring proprietors, but there is no just sense in which the reciprocal easement for its preservation can be deemed a legal incumbrance upon the property. The *benefit* thus secured to each is *not converted into a burden*, by the mere fact that it is mutual and not exclusive."

Viewing the legal effect of the regulation and the party wall in this light, the constitutionality of the regulation has been sustained in many carefully considered cases by courts of distinguished ability.

In Swift *vs.* Calnan, 102 Iowa, 206, the court says (p. 213):

> "Titles to real estate are held subject to such legal conditions as may, from time to time, be established. They are subject to such statutory and police regulations as affect the safety and good order of society. A tract of land, from its mere location with respect to another, may owe it a servitude; and one must so use his own as not to unnecessarily injure another. As said in the case of Evans *vs.* Jayne, 23 Pa. St., 34: 'The law relating to party walls is no invasion of the absolute right of property. It prescribes simply a rule for the convenient, economical, and safe enjoyment of property by the owner.' And we may add that such law prevents disputes and unseemly contentions between 'neighbors,' and, as an exercise of the police power is valid. . . . Each of these enactments was borrowed from the civil law, and has for its basis the equitable doctrine that

'equality is equity.' Neither takes from the proprietor of the land anything except for benefits received. Nor can they be said to be violative of the constitutional provisions with reference to private property, for the reason that they adjust the equities of the parties as nearly as possible according to natural justice. Under the party wall statute, the adjoining proprietor is not bound to contribute to the expense of the wall. No burden is cast upon him until he makes such use of it as to indicate that he desires to use the wall in common. At most, he parts with the use of not to exceed nine inches in width off the side of his land as an easement in favor of his neighbor. Compulsory easements for the public good are quite common to our law. See the law with reference to drains, dams, and division fences."

In Hunt *vs.* Ambruster, 17 N. J. Equity, 208, Chancellor Greene says (p. 214):

"The ordinance is not repugnant to the Constitution of the United States, or of this State, because compensation is not provided for the land occupied by the wall. The land is not taken for public use, and, therefore, not within the term or meaning of the Constitution. The land is not taken from the owner in any sense. It remains his, together with the wall constructed upon it. If he use it, or any part of it, for building purposes, he is required to pay the adjoining owner a moiety of the cost of the portion so used. The ordinance, for purposes deemed equally advantageous to both the adjoining proprietors, and beneficial to the corporation at large, imposes a burden upon the land. The proprietor of the land thus burdened, in contemplation of law, receives an equivalent in the corresponding easement which he enjoys in the land of the adjoining proprietor.

"Similar laws have existed from a very early period in England and in this country, and they have been regarded not as unauthorized viola-

> tions of the property or rights of the citizen, but rather as reasonable and useful regulations, and as evidences of a vigilant and civilized police."

In Heron *vs.* Houston, 217 Pa. St., 1, decided in 1907, Judge Stewart says (p. 3):

> "It is too late at this day to question abstractly the right of the legislature to confer upon municipalities the power of regulating party walls. Never since we have been a State have we been without legislation of this kind; and every enactment on the subject has contained the fundamental feature here challenged—constitutional warrant for the appropriation, under municipal regulation, by one of two adjoining lot owners of a certain portion of the other's land, for the construction of a party wall for their common enjoyment and use. This legislation has not only been acquiesced in and acted upon until it has become a settled rule of property, which it would be most dangerous to public interest to destroy, but its constitutionality has been recognized by judicial authority in unmistakable terms. 'There can be no available objection,' is the language of the court in Evans & Watson *vs.* Jayne, 23 Pa., 34, 'to the principle upon which our laws as to party walls is based. . . . The principle is no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line.' The principle upon which these enactments rest is the general police power of the State."

In Hunt *vs.* Ambruster, 17 N. J. Eq. (2 E. C. Green), cited *supra*, the party wall regulation was an ordinance of the city of Camden, and, as stated in the opinion of the chancellor (p. 211)—

> "provides that any person erecting a building within the city of Camden, may construct the outer foundation walls thereof equally on his

> own land and on the land of the adjoining proprietor, according to the directions of the city surveyor; and that the owner of the building first erected, shall be reimbursed one moiety of the value of such party wall, or so much thereof as the next builder or owner upon the adjoining lot shall have occasion to make use of, before such next builder or owner shall in anywise use or break into the same."

This ordinance is a substantial copy of section 1 of the Pennsylvania statute of February 24, 1721 (Purdon's Dig., 13th Ed. vol. 3, p. 2836), under consideration in Heron *vs.* Houston, 217 Pa. St., 1, above cited, from which statute the building regulation here involved is taken.

It is not materially different from the British statute, 14 Geo. III., c 78 (1774), which provides, in section 14 that—

> "one-half of such party wall between house and house, etc., shall be built on the ground of one of the adjoining houses, and the other half on the ground of the other; and the first builder of such party wall, and the workmen employed, may enter upon the ground adjoining thereto to build such party wall,"

while section 41 provides for the reimbursement of the first builder, by the adjoining owner, of one-half the cost of so much of the wall as he shall use. Nor is there any substantial difference between these several provisions and those of the Code of Louisiana, considered in the following cases.

In Larche *vs.* Jackson, 9 Martin, 724, decided in 1809, the court says (p. 726):

> "The Civil Code provides that he who builds first in the city, town, and suburbs of the territory, in a place which is not surrounded by walls

may rest one-half of his on the land of his neighbor. Civil Code 132, Art. 23. The object of the legislature was clearly to promote the inclosure of lots with stone or brick walls, as much as possible; and the circumstances of a house having been already erected on the adjoining lot, does not preclude the party from the benefit of the provision, when the partition or wall does not interfere with any building previously erected.

"The territorial legislature was not, in fact, as far as I can ascertain, disabled from passing this part of the Code."

In Carrigan *vs.* DeNeufbourg, 3 La. Ann., 440, the court says (p. 441):

"Article 671 which gives the right to the owner who first builds in a place not surrounded with walls to rest half his wall on the land of his neighbor, provided he build in a certain manner, we think must be held as establishing an urban servitude with which urban property is encumbered, without reference to title or the agreements of parties. Civil Code, 662, 670. We do not think that any constitutional question as to the enforcement of this right arises in this case, which presents a naked question of law under the provisions of the Code.

"Article 671 existed in the Code of 1809, and a large proportion of the buildings of the city contain party walls, particularly in those parts in which the land is most valuable. It is acted upon every day, and is well understood by architects and workmen. Notwithstanding the great difficulty of exercising the right it confers, it rarely gives rise to any litigation. The case of Larche *vs.* Jackson and Crocker *vs.* Blanc, appear to us to be conclusive, as to the objections raised by the counsel for the plaintiff in argument."

In Head *vs.* Amoskeag Mfg. Co., 113 U. S., 9, this court, through Mr. Justice Gray, stated a general

principle which would seem to apply to legislation of this nature in these words (p. 21):

> "When property, in which several persons have a common interest, can not be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

In Wurtz *vs.* Hoagland, 114 U. S., 606, this court sustained proceedings under a New Jersey statute whereby, on the application of a limited number of owners in severalty of lots subject to overflow from freshets or in a usually marshy or wet condition, a commission might devise a means of drainage for the benefit of all the lots owned in severalty in such tract, charging each with its fair share of the cost, even though such other owners did not desire to have their lots drained. Mr. Justice Gray, also delivered the opinion of this court in that case, quoting (p. 611) with approval from the opinion of Chancellor Zabriskie in Coster *vs.* Tide Water Co., 3 C. E. Green (18 N. J. Eq.), the passage in which the chancellor says:

> "But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the Government *to prescribe public regulations for the better and more economical management of property of persons whose property adjoins*, or which, from some other reason, can be better managed and improved by some *joint operation*, such as the power of regulating the *building of party walls; making and maintaining partition fences* and ditches," etc.

And Mr. Justice Gray also quotes in that case (p. 612) with approval, from the opinion of Chief Justice Beasley in the same case, on appeal to the Court of Errors and Appeals, in which the Chief Justice says:

> "But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the *same character as provisions concerning party walls and partition fences.*"

When it is considered that the case of Hunt *vs.* Ambruster, 17 N. J. Eq., 208, cited *supra*, was decided at February Term 1865, and Chancellor Zabriskie's decision in Coster *vs.* Tide Water Co., in the Court of Chancery, was rendered at October Term, 1866, and Chief Justice Beasley's decision in the same case in the Court of Errors and Appeals was rendered at November Term, 1866, both courts, in their references to party-wall regulations must have had in mind the decision in Hunt *vs.* Ambruster, so lately rendered and appearing in the last volume of reports immediately preceding those decisions, and must have meant to give the doctrine therein stated their unqualified approval.

The only case in which such a regulation has been held to be invalid, so far as counsel for appellant has been able to discover, is the case of Wilkins *vs.* Jewett, 139 Mass., 29, in which the court, by Mr. Chief Justice Morton, held that a former provincial statute to the same effect as this regulation was not continued in force after the adoption of the Constitution, because, as it would seem, it would have then been unconstitutional.

But in the case of Kennedy *vs.* Owen, 131 Mass., 431, the same justice, construing the Massachusetts statute relating to party fences (Gen. Stats., c. 25) which au-

thorizes such fences to be placed in part upon the lands of the adjoining owner, says (p. 432):

> "The plaintiff *had the right to build the fence upon the division line, placing one-half upon his land and one-half upon the defendant's land*, but he had no right to build any part of it wholly upon the defendant's land."

It is not indicated in either decision that there is any difference in legal principle, between placing one-half of a party *fence* upon the adjoining owner and placing one-half of a party *wall* in the same position.

The same necessity exists, in urban communities, and in even greater degree than in rural ones, for the physical separation of the lands of contiguous owners, and the mere fact that in the former, the physical separation is by a *wall* instead of a *fence* which may also at the same time economically serve the purposes of an enclosing and supporting structure for a house, creates, it is respectfully submitted, no different legal principle.

The mathematical line of contact between adjoining owners is inappreciable to the senses and incapable of supporting any known form of physical separation. Whatever physical form of separation is employed must, therefore, of necessity, be placed either wholly upon the land of each, resulting in needless duplication of labor, material, expense and waste of space, or else be equitably placed equally upon the lands of both.

It is respectfully submitted that the subject of the location, as well as the structure, of division walls between adjoining owners in urban communities, like the location and structure of division fences in rural ones, is a subject proper for the exercise of the police power.

In the case of the C. B. & Q. Ry. *vs.* Drainage Commissioners, 200 U. S., 561, it was pressed upon this court by counsel for the railway company that the police

power could extend only to such subjects as concerned the public health, morals, or safety, but this court declined to admit that limitation, saying, through Mr. Justice Harlan (p. 592):

> "We can not assent to the view expressed by counsel. We hold that the police power of a State *embraces regulations designed to promote the public convenience or the general prosperity*, as well as regulations designed to promote the public health, the public morals, or the public safety."

The utility, convenience, mutual advantage, and justice of this regulation are too obvious, it is submitted, to justify discussion.

III.

The Wall in Question Complies with the Requirements of the Regulation as to Party Walls.

The question presented by this proposition is practically one of fact as to the physical character of the wall. The only objection suggested in the pleading is contained in the eleventh paragraph of the bill, wherein it is averred that—

> "the said projected wall, so as aforesaid now being erected in part upon land belonging to these complainants, is in no sense a party wall *as defined in said regulations*. The back of said window is *connected* with the west wall of defendant's house with bits of wall *built on a 'splay,'* as it is known in builders' language; that is, it is *not constructed at right angles with said west wall*. Wherefore it could not be utilized by these complainants in connection with any building on their lot without an added expense due to the need of cutting out the corners on complainants' land; and, in addition to being unsightly is of no practical use to these complainants for any of the purposes of a party wall."

It will be seen at once that it is not the structure of the *party wall* which is complained of, but the other walls connecting the party wall with the main building. And it is because these walls do not run at right angles with the party wall that the latter is said to be "in no sense a party wall."

The only testimony offered on the subject is that of Mr. Ashford, the Inspector of Buildings, called as a witness for the complainants below, appellees here.

He testifies (Rec., p. 15) to the fact that these connecting walls run at an angle of forty-five degrees from the party wall and that if the adjoining owner wished to extend that party wall, making it longer, he would have to cut out angles in the wall to give a tie to the new wall. This he thinks would cost as much as the value of the wall, although on cross-examination he admits it would be "just a little cold-chisel work" (Rec., p. 23). And the witness distinctly admits that the oblique angle at which these connecting walls run from the party wall, in a house setting back from the building line, as this is shown to do by the averment of the bill (par. 6, Rec., p. 3), would not take the wall out of the category of a party wall under the regulations. The question and answer are as follows:

> "Q. Suppose a man builds a house *back from the building* line and has two side walls parallel to the adjoining owner's line, and has party walls on them; and then instead of building his front *at right angles* to the two side walls he places his front wall *at an oblique angle*, or the *same angle that this bay-window is*. Is there anything to prevent those walls from being party walls? A. *If he sets back from the front of the lot he may do that*; but he creates a condition that imposes additional hardship upon the adjoining owner" (Rec., p. 22).

On further cross-examination he admits, categorically, that the use of the wall, as a party wall, to support joists or things of that sort, is not affected by the splay of the other walls; that the capacity and strength of the wall are not affected, nor the ability to use the west face of it as a party wall (Rec., p. 23). The only respect in which he makes any criticism is that if the adjoining owner chose to lengthen the wall, the connection or tieing in of the added wall would involve this "cold-chisel work" (Rec., p. 23), although as he admits on the previous page in a house setting back from the street forty feet as this does (par. 6, Rec., p. 3), this condition does not prevent the wall from being a party wall under the regulations. And it is well here to bear in mind that the adjoining owner has no duty to pay for the wall unless he uses it, and then only one-half of the value of so much of the wall as he uses, to be "fixed by the person or persons so appointed by the Commissioners" (Sec. 62 of Regulations), and the matter of cutting out angles properly belongs to the question of the *valuation* of the wall, should it be used, and not to the question of its being a structure in compliance with the regulations. As a physical fact, therefore, the wall is not shown to depart in any respect from the requirements of the regulation.

The Court of Appeals, in its opinion, fell into the error of supposing, by reason of certain correspondence between appellant and Mr. Ashford, the Inspector of Buildings, that appellant was without authority in the premises to construct a party wall at all. The court says (Rec., p. 42):

> "The record discloses that appellant constructed this wall without authority from the officers of the District. In fact, as shown by the following communications, he proceeded, with full notice from the authorities that his permit to construct his house did not include a permit to construct a party wall."

Thereupon are set out the communications. The first is a letter from appellant to the Inspector of Buildings merely calling attention to an error in the figures given in first application and correcting it. In his reply, the inspector says (Rec., p. 42):

> "The party wall is located on your own responsibility without authority from this office, as I do not, at the present time, locate party walls outside of Florida Avenue or Washington City proper."

The court below entirely misconceived the situation presented by this correspondence. The inspector was not denying the appellant's right to build a party wall or refusing a permit to do so, but was simply disclaiming official responsibility in the matter, as it was no part of his duty to set or lay out foundations of party walls. This is a matter of demonstration from the express provisions of the Code of Laws for the District, and the inspector's testimony on this subject, both of which the court below obviously overlooked. By the express provisions of the Code, the duty of locating the foundations of party walls on the lands of the adjoining owners is placed upon the *surveyor* of the District, and not upon the Inspector of Buildings, and a *permit is never given by him, under any circumstances, either within or without the city, to erect a party wall.* The provision of the Code is as follows:

> "Sec. 1589. It shall be the duty of the *surveyor* to attend, when requested, and examine the *foundation or walls* of any house *to be erected* . . . for the purpose of adjusting . . . and correctly placing the *party wall on the line of division between that and the adjoining lot*; and his certificate of the fact shall be admitted as evidence and binding on the parties interested."

And this course was duly pursued and is so alleged in the bill, which states that (par. 7, Rec., p. 3).

> "He therefore procured the surveyor of said District, against the protest of your complainants, to enter upon their said land, and set out the foundations of the intended west line of said bay-window equally upon the lands of your complainants and the defendant's own land."

The testimony of Mr. Ashford, the Inspector of Buildings, is so clear and positive to the point and shows so plainly that the court below was misled by the letter set out in the court's opinion, that his testimony is here set out in full:

> "Q. You say there have been built, in the last eight or ten years, three or four thousand houses outside of Florida Avenue. You approved the plans of those houses, I suppose? A. Yes, sir.
>
> Q. Did you or not locate any of the party walls? A. *No, sir; we never locate the party wall.* The permits distinctly state that houses are to be built within the confines of the lot or lots named. *Every permit that is issued restricts* the building to the premises named in the permit. As I stated, they locate party walls *outside* of these permits, *by virtue of an easement or regulation*, which was promulgated years ago; but *we do not even authorize it in the city.*
>
> . . . . . .
>
> Q. You do not authorize the laying of a wall on adjoining ground anywhere? A. No, sir.
>
> Q. In the city or out of the city? A. No, sir.
>
> Q. And these party walls, resting in part on the two adjoining lots, have been built in the manner you stated, both in the city and without the city? A. Yes, sir.
>
> Q. And when you speak about the permits limiting the building to the lot mentioned in the permit, you refer also to permits within the city as well as without the city? A. *All* permits.

Q. There is no difference in the permits? A. *There is no difference.* The party line shown on the plans is purely an arbitrary arrangement. I do not know whether it is within the confines of a man's property or not. There is absolutely no way to ascertain that his lot is only 16 feet wide, because it says that it is 16 feet wide, and I do not undertake to ascertain that. I give him a permit to build on his lot, whatever lot he names in his application, and on no other lot.

Q. And a house of the character and description shown in the plans and specifications? A. Yes.

Q. Who, then, determines where the party line shall go? A. That takes the joint action of the surveyor's office and my office. If the applicant elects to have a survey made, we give the surveyor's office a certificate and *he* locates the party wall, according to the lot on the statement. Sometimes they will elect not to have a party wall; but the plans show just the same. On this plat that goes to the surveyor they indicate whether they intend to build a party wall or not, and *he locates it and certifies to it as a party wall.* The *only connection I have with it is to see that, if it is a party wall it is built according to the regulations for party walls as to thickness, dimensions,* etc."

It will be further observed that at the very outset of section 62 of the regulations, after stating that the regulation is the one approved by President Washington, it is stated:

> "The Inspector of Buildings *has no official duty* as to the enforcement of this regulation, as the matter is one of private rights between parties."

It is, therefore, a demonstration from the record that the court below fell into error. The letter of the inspector was merely a reminder that he, the inspector, had no official duty in the matter, and so far as the *permit* is con-

cerned, the appellant had the same permit and the only kind of permit the authorities give to any one to build anywhere.

So far as any official sanction was required, that of the surveyor, the appellees' own bill alleges and complains that appellant did have that.

IV.

Even if the Wall in Question Does Present Minor and Remediable Departures from the Requirements of the Regulations the Decree Should be Modified.

If the appellant had the lawful right to build a party wall where built, but the court should be of opinion that the wall does not strictly conform with the regulations it would be unjust and inequitable to require the defendant to tear down the enclosing wall of his residence when the only alleged departure from the regulations can be corrected by merely taking a cold-chisel and cutting out the corners so as to present a right angle juncture between the party wall and the connecting walls.

By the terms of the statute allowing appeals from the Supreme Court of the District of Columbia to the Court of Appeals it is expressly provided that on such appeal—

> "the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse or *modify* the same as shall be just."
>
> (Code, Sec. 226).

And, by section 233 of said code, by which this case comes before this court for review, it is provided that—

> "any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed or modified by the Supreme Court of the United States."

Motion was made in the court below, at the same term, and fifteen days after the entry of judgment for a modification of the decree (Rec., pp. 43-5) but the motion was denied (Rec., p. 45). As no opinion was given upon the motion counsel is not advised by what considerations the court was guided.

In the trial court there was no opportunity for such a motion because that court held the regulation itself to be invalid (Rec., pp. 36-7). Of course if there be no legal right to have a party wall at all, the only proper decree was that the whole structure, in so far as it rested upon the adjoining land, should be removed.

If this court should be of opinion that the appellant had the lawful right to build such a wall, but that the existing structure departs from the requirements of the regulation in the respect complained of in the bill and explained in the testimony, the correction of such departure is, on the appellees own showing in the record, a matter of entire simplicity and does not require the removal of the wall. To exact removal, under such circumstances would not, it is submitted, be doing justice or equity to either party but would be the imposition of a penalty.

That appellant acted in good faith under an absolute provision of law, never adjudged to be invalid, admitted to be valid within the city where it has been acted upon for over a century, and acted upon by thousands outside the city whose houses have been built on the faith of its validity is not open to question. If he and they have mistaken the law, this court is of course powerless to relieve them and they must take the consequences. But if they be not in error and they have the legal right to build party walls resting equally upon their own and the adjoining lots, then it is submitted that justice neither requires nor permits that more be exacted of them than a faithful compliance

with the regulation in the physical structure of the wall.

Such was the judgment and opinion of the Supreme Court of the District of Columbia in the case of Corcoran *vs.* Nailor, 6 Mackey, 580, in which the defendant had built a party wall under this regulation, but had departed from the regulations in having openings or windows therein, instead of presenting a solid wall. In that case the court did not decree the removal of the wall but merely that the departures from the regulation be corrected. Mr. Justice James saying (pp. 584-5):

> "He has a clear right to require that this illegal structure shall be *conformed to the law* authorizing party walls, and this can be done only *by closing the openings*, and by doing so in such manner as shall render the filled up spaces suitable for support and for all the purposes contemplated by the right of joint use. To this end a mandatory injunction is the proper remedy."

It is respectfully submitted that the decree of the court below should be reversed.

WM. G. JOHNSON,
Counsel for Appellant.

APPENDIX.

EXTRACT FROM BUILDING REGULATIONS CONTAINING ALL PROVISIONS RELATIVE TO PARTY WALLS.

Party Walls.

Sec. 62. The fourth section of the Building Regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force, and is published for the information of builders. The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties:

"That the person or persons appointed by the Commissioners to superintend buildings may enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall, the charge of value thereof to be set by the person or persons so appointed by the Commissioners."

Sec. 63. The maximum thickness of a party wall laid upon the adjoining lot shall be nine inches in the cellar, and in all cases where a building is erected and party

wall is constructed the party line shall be carefully preserved by receding four and one-half inches from the front with that portion that extends over the line, except in center of continuous blocks. Party walls laid upon the adjoining lot more than nine inches will not be permitted unless the application is accompanied by the written consent of the adjoining owners. Party walls will not be permitted in steel or skeleton construction except as provided in section 68, nor of rubble or concrete except when the written consent of the adjoining owner is filed in the office of the Inspector of Buildings.

Sec. 64. When the building owner increases the height of a party wall, he shall carry up at his own expense all smoke flues and vent pipes connected with said wall which belong to the adjoining property to a height of four feet above the new wall and new roof.

Sec. 65. Party walls shall be brought up through the roof covering, and shall be built up at least six inches above the roof of the highest building of which such wall forms a part for the full extent of the roof and mansard in contact with said wall, and shall be covered by brick laid on slate or by a coping of stone or metal so as to effectually prevent the connection of the roofing of any two or more houses or buildings.

Sec. 66. Party walls in adjoining buildings hereafter erected shall be so constructed that the floor timbers from opposite sides of said walls shall have at least three and a half inches bearing thereon and be separated laterally and at ends by not less than four inches of solid brickwork when possible. Hangers will be used where 9-inch party walls are encountered, and the cutting of such 9-inch walls for floor joists will not be permitted.

Sec. 67. The building owner may be required to pay for one-half of an existing party wall, or for so much thereof as he may use, whether or not said wall be cut, and the quantity or measurement of wall so used shall

be computed by person or persons agreed upon by the parties in interest, or by the Inspector of Buildings if said parties should so elect; provided that said Inspector of Buildings shall not perform such services during office hours. The indemnity to the adjoining owner shall be paid by the building owner previous to the cutting or in any manner using said wall at the current price for similar work.

Sec. 67a. The following extracts from the Code of Law for the District of Columbia with reference to party walls is published for the information of builders:

Sec. 1585. Deficiency in Number of Feet.—Whenever the surveyor shall lay off any lot or any parts into which a square or lot may be subdivided, as provided in this chapter, he shall measure the whole of that front of the square on which such lot or part lies, and if, on such admeasurement, the whole front of the square exceeds or falls short of the aggregate of the fronts of the lots on that side of the square, as the same are recorded, he shall apportion such excess or deficiency among the lots or pieces on that front agreeably to their respective dimensions.

Sec. 1586. Party Walls.—Whenever, on such admeasurement, the wall of a house previously erected by any proprietor shall appear to stand on the adjoining lot of any other person in part less than seven inches in width thereon, such wall shall be considered as standing altogether on the land of such proprietor, who shall pay to the owner of the lot on which the wall may stand a reasonable price for the ground so occupied, to be decided by arbitrators or a jury, as the parties interested may agree.

Sec. 1587. If the wall of any house already erected, cover seven inches or more in width of the adjoining lot, it shall be deemed a party wall, according to regulations for building in the District, and the ground so

occupied more than seven inches in width shall be paid for as provided in the preceding section.

Sec. 1588. The surveyor shall ascertain and certify and put on record, at the request and expense of any person interested therein, the fact of the occupation of land by a party wall, as mentioned in the preceding section.

Sec. 1589. Adjusting Lines of Buildings.—It shall be the duty of the surveyor to attend, when requested, and examine the foundation or walls of any house to be erected, when the same shall be level with the street or surface of the ground for the purpose of adjusting the line of the front of such building to the line of the street and correctly placing the party wall on the line of division between that and the adjoining lot; and his certificate of the fact shall be admitted as evidence and binding on the parties interested.

To Locate Party Wall, May Cut Away Frame House.

Sec. 71. The builder of a brick house adjacent to a frame house has the right to cut away the latter sufficiently to place a party wall equally upon his own and adjoining lot.

Sec. 72. The builder of a brick house, when availing himself of the privileges specified in section 71, is required to make good all damages occasioned thereby to the frame house.

Sec. 73. Where an excavation is to be made adjacent to and below the foundation of a wall other than a party wall, the building owner shall give adjoining owner ten days' notice in writing before proceeding with the work.

Party Wall—Use, Repair, Removal, and Expense.

Sec. 74. The Inspector of Buildings shall, upon the application of any building owner or his authorized agent, examine any party wall, and if deemed by said

inspector to be defective, out of repair, or otherwise unfit for the purpose of new buildings about to be erected, such party walls shall be made good or taken down by the building owner, as the decision may be, unless the wall is considered by the Inspector of Buildings unsafe for either the existing building or the proposed new building; then, and in that event, it shall be repaired, removed, or otherwise made safe under the provisions of section 16. But when the wall is safe and sufficient for the existing building, then the cost and expense of such repair or removal, together with the expense of the new wall or walls erected in lieu thereof, shall be borne and paid exclusively by the building owner, except in case of steel frame, stone, and concrete construction, which will depend on agreement of adjoining owners, and the building owner shall also make good all damages occasioned thereby to the adjoining owner or his premises: *Provided*, That these regulations shall not be construed to justify the building owner in encroaching upon the premises of the adjoining owner beyond the party wall already built, or, in the case where no party wall has been built, more than nine inches without having first obtained the written consent of the adjoining owner of the premises so to be encroached upon. If in such case, the building owner prefers to build an independent, new wall by the side of the old party wall, he shall be relieved from reimbursing the adjoining owner for former outlay in building the party wall. The thickness of the new wall shall be determined by the Inspector of Buildings in each and every case, but shall never be less than nine inches.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 85.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL AND OTHERS.

MOTION TO DISMISS.

Come now the appellees herein, by their counsel, and move to dismiss the appeal in the above-entitled cause, because the judgment appealed from is not one in which is drawn in question the validity of a statute of or an authority exercised under the United States; and also because the matter in dispute does not exceed the sum of $5,000. In support hereof the appellees attach hereto and file herewith the affidavits of Andrew Murray, James P. Parry, and Ferd T. Schneider as to the value of the matter in dispute.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
BARRY MOHUN,
Attorneys for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1912.

No. 85.

LEWIS E. SMOOT, *Appellant,*
vs.
JULIA TURNER HEYL AND OTHERS.

NOTICE.

To W. G. JOHNSON, Esq.,
Counsel for Appellant:

Please take notice that on Monday, the 18th day of November, 1912, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is a copy of the affidavits filed in support of this motion and of the brief to be submitted with said motion in support thereof.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
BARRY MOHUN,
Attorneys for Appellees.

Received a copy of the above notice and of the motion and attached affidavits and brief in said notice referred to this 28th day of October, 1912.

W. G. JOHNSON,
Attorney for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

LEWIS E. SMOOT, *Appellant,*
vs.
JULIA TURNER HEYL AND OTHERS.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS.

Statement.

Appellant was the owner of a lot having a frontage of fifty feet on Wyoming avenue, in what is known as the "county" of Washington, outside the limits of the Federal city as originally laid out and projected. Early in September, 1905, he applied to the District authorities for a permit to construct a house on this lot, set back fifteen feet from the street, the west wall being nearly four feet within his own west line, which was also the eastern boundary line of appellees' lot. This wall was forty feet long and three stories high. Five feet back from the front of the house a bay window was projected eight feet wide and one story high (about thirteen feet). On the 9th day of September, 1905, a permit was issued by the inspector of buildings in accordance with drawings then on file in his office (R., p. 18). On the 14th day of September the appellant wrote the inspector of buildings, asking that the permit be amended so as to show thickness of party wall. The proposed party wall was a bay window, the foundation of which extended eighteen inches over the dividing line, and the back wall above the surface of the ground extended six and a half inches over the line. In response to this request to so change the permit, and erect the house according to the changed plan, which showed the proposed window projecting over the land belonging to appellees, the appellant was notified on the fol-

lowing day, by the inspector of buildings, that the public authorities did not "locate party walls outside of Florida avenue or Washington city proper," and that if he, the appellant, located such a wall it must be done on "his own responsibility and without authority from" the building inspector's office (R., p. 20).

On the 22d of September, 1905, appellant filed in the Supreme Court of the District a petition in mandamus, seeking to compel the inspector of buildings to enter upon appellant's land and lay out the "westernmost wall of petitioner's house," the back of the bay window. Then for the first time the matter was brought to the attention of the appellees, owners of the lot next adjoining on the west, over which the appellant proposed to project the back or west wall of the bay window. Appellees promptly gave notice that they objected to the proposed projection, and that they would treat as a trespasser any person who entered upon their land for the purpose of either laying out the lines or building the proposed bay window.

The appellant thus had ample notice—

(*a*) That the District authorities did not claim any right under existing law to compel the erection of party walls outside of the Federal city against the wishes of owners of the servient land.

(*b*) That the owners of the servient land objected to the erection of the projecting bay window.

With this knowledge and notice the appellant dismissed the mandamus proceedings and forthwith, on his own responsibility and without a formal permit, entered upon appellees' land, dug the foundation for the proposed bay window, "and proceeded, with full notice from the authorities that his permit to construct his house did not include a permit to construct a party wall" (R., p. 42). He was proceeding with the erection thereof when appellees filed their bill in the Supreme Court of the District seeking to enjoin the further erection of the window and the removal

of so much of it as projected over their land. Without waiting for a judicial ascertainment of the matters thus brought in controversy, the appellant completed the structure.

The right to erect a bay window as proposed by appellant was claimed under an act of Congress approved June 14, 1878, which is as follows:

> "CHAP. 194.—*An Act to Authorize the Commissioners of the District of Columbia to Make and Enforce Regulations for the Sale of Coal and also Building Regulations.*"
>
> "That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to make and enforce such rules and regulations relative to the sale of coal in the District of Columbia as shall insure full weight to the purchaser of coal; and all such building regulations for said District as they may deem advisable."
>
> 20 Statutes, 131.

On final hearing it was adjudged by the Supreme Court of the District of Columbia that so much of the bay window as encroached upon appellees' land should be removed. The learned justice who heard the case filed a written opinion, in which, after calling attention to the act of June 14, 1878, as above set forth, continued:

> "The 'regulation' by appropriate authority of the exercise of a right already existing is quite different from depriving the property owner of a vested right and revesting that right in another property owner, and this latter Congress has not seen fit to authorize or to provide for; by the use of the word 'regulation' in the act referred to, Congress had done no more than authorize the Commissioners to throw around the general right of property owners to erect buildings such limitations as the public safety and general welfare may require. Congress has not created, and has not undertaken to authorize the Commissioners to create a procedure competent to deprive a property owner of the use of part of his property and give that interest to his neighbor."

This judgment was affirmed on appeal on entirely different grounds from those on which the decision went in the Supreme Court of the District. The Court of Appeals held that the projection should be removed because, first, it was built without a permit and in disregard of the building regulations and, second, because the back wall of the bay window "fills none of the requirements of these regulations" in respect of party walls in the District of Columbia. The court adds:

> "Appellees can derive no such benefit from it, as the servient owner is entitled to receive as compensation for the taking and occupation of his land. It constitutes a nuisance rather than a benefit" (R., p. 42).

A prayer for the allowance of an appeal was made to the Court of Appeals, and certain affidavits were filed in support on the point of the amount in dispute. A brief in support of this prayer was submitted by counsel for the appellant. Notice of this application for appeal was given counsel for appellees; also a copy of the brief in its support.

A brief in opposition to the allowance of the prayer for appeal was submitted in behalf of the appellees, but no counter-affidavits as to the value of the matter in dispute. This because the estimates of the builder and decorator submitted by the appellants, showed that the bay window could be entirely taken down and rebuilt and the ceilings and side walls of the library and billiard-room in appellant's house redecorated and repapered at a cost of $1,910.

On consideration of these affidavits the Court of Appeals found that the matter in dispute did not exceed $5,000 and the prayer for an appeal was not granted.

An *ex parte* application was thereupon made to one of the associate justices of this court and an appeal allowed (R., p. 31). Counter-affidavits on the question of the amount of the matter in dispute have been filed in this court, and on these and the record on appeal from the Court of Appeals the motion to dismiss is predicated.

BRIEF.

I.

The right of appeal is predicated of two propositions:

(1.) That in the decision of the Court of Appeals the validity of an authority exercised under the United States and of a statute of the United States is called in question.

(2.) That the value of the matter in dispute exceeds $5,000.

With regard to the first proposition it is only necessary to say that the appellees in their bill did not challenge or assail the validity of any law of Congress, nor did the Court of Appeals undertake to pass upon any such law in disposing of the case. On the contrary, the bill charged that there never had been an enactment by Congress authorizing the erection of party walls in the "county," outside the limits of the Federal city as originally planned and laid out, and that the Commissioners of the District, even after the passage of the act of June 14, 1878, had never attempted to exercise jurisdiction over party walls except within the city limits.

The history of party walls as they obtain in the city proper, that is, the Federal city, is very interesting. The right to erect such walls is not authorized by any statute, but is a covenant running with the land from the time the city was founded. The Maryland farmers, original proprietors of lands selected as the site for a Federal city, in making conveyances of them to commissioners appointed to lay out the city, provided that the lands so conveyed should be subject to "such terms and conditions as shall be thought reasonable by the President for the time being for regulating the materials and manner of the buildings and improvements on the lots generally inside of the city, or any particular streets or parts thereof, for common convenience.

safety or order, provided such terms and conditions are declared before the sale of any lots.

Under and by virtue of this grant of power, President Washington, on the 7th day of October, 1791, and before any of the lots conveyed to the commissioners were sold or reconveyed, promulgated certain building regulations. One of these is in the following terms:

> "That the person or persons appointed by the commissioners to superintend the buildings may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall. The charge or value thereof to be set by the persons so appointed by the commissioners."

Thereupon all lands lying within the limits of the Federal city became and were subject to this regulation, and so continue to the present time.

The late Justice Cox of the Supreme Court of the District learnedly and exhaustively reviewed the whole subject of party walls in the District in the case of

Fowler *vs.* Saks, 18 D. C., 570.

After quoting the above promulgation of President Washington, Judge Cox says (p. 579):

> "This building regulation, so authorized, is the foundation and the only source of the right claimed by any one here to locate his party wall one-half on his neighbor's land."

This decision was handed down in March, 1890, long after the passage of the act of June 14, 1878, and has ever since been considered the law on the subject in the District.

In his brief in the Court of Appeals, in support of his right of appeal, counsel for the appellant cited the case of

B. & P. R. R. Company *vs.* Hopkins, 130 U. S., 210.

In that case it appeared that the railroad company had laid four separate tracks on Maryland avenue between Ninth and Tenth streets, in Washington, in front of Hopkins' house, and used these tracks for the storage, loading and unloading of freight cars. Hopkins thereupon brought suit as for nuisance committed resulting in injury to him and his property, and recovered a verdict of $1,328.

The company attempted to justify under certain acts of Congress authorizing the laying of tracks along Maryland avenue, and contended that the validity of these acts was drawn in question by the judgment of the court in general term. This contention was denied by this court, which held (p. 226):

> "The validity of the statutes and the validity of authority exercised under them, are, in this instance, one and the same thing; and 'the validity of a statute,' as these words are used in this act of Congress, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power."

The writ of error was dismissed as for want of jurisdiction.

Commenting on the Hopkins case, this court in the subsequent case of

South Carolina *vs.* Seymour, 153 U. S., 359,

used this language:

> "But this court held that only the construction of the acts of Congress, and the extent of the authority claimed under them, and not the validity, either of the statutes, or of the authority, was drawn in question; or, in other words, it was 'a case which depends only on a judicial construction of an act of Congress, there being no denial of the power of Congress to pass the act, or of the right to enjoin whatever privileges are granted by it.'"

In

Steinmetz *vs.* Allen, 192 U. S., 543,

also cited in brief of appellant's counsel, the validity of "authority exercised under the United States" was not only directly drawn in question, but it was held that the Commissioner of Patents might be compelled by mandamus proceedings to exercise such authority, which he had declined to do.

But in arriving at its decision the Court of Appeals did not question or even refer to the statute of June 14, 1878, or to the party wall promulgation of President Washington. That court simply decided that the little patch of a bay window, forming no part of the main wall of appellant's house, filled none of the requirements of a party wall, because the owners of the servient land could derive no such benefit from it as they are "entitled to receive as compensation for the taking and occupation" of their land. And the court further found that the appellant had constructed his bay window without authority from the officers of the District, or a permit, an indispensable prerequisite to the erection, alteration, or repair of all buildings in the District of Columbia.

The court concluded (R., p. 42):

> "Since the total failure of appellant to comply with the building regulations is decisive of this case, it is unnecessary to pass upon the question as to whether or not that portion of the building regulations relat-

ing to party walls is enforcible in the District outside of the limits of the original city of Washington. The validity of those regulations as applied to the construction of party walls outside of the original city was forcibly assailed by counsel for appellees, but upon this point we refrain from expressing any opinion."

II.

In support of his second proposition counsel for appellant submitted four affidavits and two estimates to show that the matter in dispute, his *damage,* if the order of the court below be enforced, exceeds $5,000, and it was contended, with seeming seriousness, that to take away six and a half inches from the back of a bay window three feet six inches deep, eight feet wide and thirteen feet high would reduce the actual "sale value of the house" $3,500.

It was not deemed necessary or advisable to file in the Court of Appeals counter-affidavits and none were filed. That court held, on the showing made by appellant, that the matter in dispute did not exceed $5,000. Thereupon, and without notice to appellees, the *ex parte* application was made to one of the justices of this court and an appeal allowed. In this condition of the cause and in support of the motion to dismiss, affidavits,* made by James S. Parry, assistant inspector of buildings of the District of Columbia; Andrew Murray, a practical builder of many years' experience, and Mr. Ferd T. Schneider, an architect, have been filed in this court by the appellees, tending to show, if not conclusively demonstrating, that the matter in dispute does not exceed $2,000. These affidavits are filed in accordance with the rule laid down by this court in

Red River Cattle Co. *vs.* Needham, 137 U. S., 632, 635:

"The result of the cases may be fairly stated to be * * * (3) but where the writ of error is brought

*These affidavits are printed as an appendix to this brief.

> or appeal taken without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter-affidavits may be allowed if the existence of such value is denied in good faith."

This case under consideration is unlike

Zeigler *vs.* Hopkins, 117 U. S., 683,

where affidavits and counter-affidavits were presented in the circuit court as to the value of the matter in dispute. The circuit court found that the property in question exceeded $6,000, and this court declined to consider the affidavits, also filed in the circuit court, though they tended to show "that possibly the property may be worth less than $5,000, they are not enough to overcome the finding of the court below that it was actually worth more than that sum."

Here the counter-affidavits are submitted, not for the purpose of showing that the Court of Appeals was wrong in denying the prayer for appeal, but that on the contrary it could not have arrived at any other conclusion touching the value of the matter in dispute.

A comparison of the affidavits filed by appellant in the Court of Appeals and the counter-affidavits filed by the appellees in this court in support of the motion to dismiss shows beyond dispute that the actual cost of tearing down the existing bay window and rebuilding it within the appellant's lines will not exceed $1,900, a sum far short of the amount necessary to give this court jurisdiction.

Two of the affidavits submitted by appellant in the Court of Appeals, one by a speculative builder and the other by a "real-estate broker," stated that to lessen the depth of the existing bay window six and a half inches will depreciate the actual sale value of the house $3,500. These estimates are "nothing more than speculative conclusions." (*Red River Cattle Co. vs. Needham, supra,* 636.)

It is difficult to comprehend how two men with such large and varied experience in the sale of real estate in the District as the speculative builder and the real-estate broker claim for themselves arrived at the sum of $3,500 as the probable depreciation of the sale value of the house to result from the removal and rebuilding of the bay window. No explanation is attempted in the affidavits. One of them seems to think that to reduce the depth of the bay window six and a half inches "will destroy the existing form, proportion and model of the house," and on this basis he forms his estimate. The other states that he has read the affidavit of the architect, "describing the physical effect upon said property of the removal of the west wall," and makes this the basis of his estimate. Manifestly these figures were suggested by the necessities of the case. And why $3,500 as the extent of the estimated depreciation in sale value, rather than $2,500 or $500, which latter would be much nearer the mark? If, instead of asking the appellant to remove so much of his bay window as projects over their land, the appellees had erected a building equal in size to that of appellant, with the east wall flush up to their own line, as they have an undoubted right to do, the "symmetry and proportion of exterior and interior" of appellant's house, of which Architect Fuller speaks (R., p. 47), would certainly have been marred if not destroyed. The resultant damage in such case would be serious to appellant, far greater than could result from lessening the depth of his little bay window, but it would be *damnum absque injuria*. And if taking six and a half inches off the depth of the bay window would have the effect to depreciate the sale value of appellant's house to the extent of $3,500, in the same ratio the erection of the proposed building on appellees' land would practically destroy the value of the house according to the theories of Edgar S. Kennedy and William A. Hill, the speculative builder and real-estate broker whose affidavits were submitted by the appellant.

By the affidavits filed in behalf of appellees it is shown that if the work be well and properly done the bay window can be taken down and rebuilt in such a way as that, after six months or less, no one not an expert could tell that the house and window as so rebuilt were not erected at the same time. The reduction in the size of the library and billiard-room of six and a half inches in the depth of the bay window could make no appreciable difference and ordinarily would not be noticed. By the affidavit of Ferd T. Schneider it is conclusively shown that the back of the bay window, if its depth be lessened as proposed, would not interfere with the use of a billiard cue as much as the side walls of that window do as now constructed.

The consequences that will ensue if the window be rebuilt of the "required reduced depth," pointed out by Architect Fuller (R., p. 47), are imaginary rather than real, as is shown by Architect Schneider in his counter-affidavit.

It must be apparent at a glance that the bay window was conceived and erected with the expectation that the owners of the land next adjoining on the west would continue to use it as "open space, sown in grass and ornamented with shrubbery," to furnish light and air for their dwelling and add to the beauty and comfort of their home (R., p. 2), and that while so used it would furnish like comfort and enjoyment to the occupants of appellant's house, or to so many of them at least as can congregate on the "deck space" of the bay window on pleasant evenings in June. All of this might readily have been accomplished had the appellant's house been erected within his own lines, and without destroying the handsome hedge of his neighbors, and trespassing on their land with a bit of brick work which "fills none of the requirements" (R., p. 42) of the building regulations in force in the District in respect of party walls.

We therefore respectfully submit that the appeal should be dismissed.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
BARRY MOHUN,
Attorneys for Appellees.

APPENDIX.

DISTRICT OF COLUMBIA, *sct:*

Before me, the undersigned, a notary public in and for the District of Columbia, personally appeared Andrew Murray, who, being first duly sworn according to law, deposes and says:

I am a resident of the city of Washington, a carpenter by trade, and for thirteen years was employed by the late John McGregor (much of the time as estimator and superintendent of construction), a contractor and builder, who was engaged in that business in the District of Columbia for many years, and while so engaged built many large and expensive building, dwelling-houses, office and public buildings, throughout the city. He died in the year 1911, and since his death I have been doing an independent business as builder and contractor.

Recently my attention was called to a small bay window, about eight feet wide and thirteen feet high, built on the west side of house numbered 2007 Wyoming avenue, in the city of Washington. Said house sets back from the street thirty-five or forty feet, and said bay window is placed three or four feet back from the front of the house. I made a careful examination of the construction of said window, and submitted an estimate to take it down and rebuild it complete for $1,253, at which cost I shall be glad to do the work, within sixty days from the time of signing the contract, said sum not to include any interior decorations that may be necessary because of the tearing down and rebuilding of the said bay window.

I have been informed that the back wall of said window is now thirteen inches thick above the ground and that it projects six and a half inches over the line of the owner of the land next adjoining on the west; also that it is desired in any rebuilding of said window to erect it entirely on the land of the owner of said house numbered 2007 Wyoming avenue. Inasmuch as said wall has no weight to carry, except the roof, it would be necessary, if the window be reconstructed as proposed, to make the back wall thereof not more than nine inches thick. If and when so constructed, sufficient space would be left in the "splay" walls of the bay

window for windows two feet four and a half inches wide, or what is known as "stock size" windows. By such rebuilding the area of any room with which the window is connected would be only slightly reduced, certainly not more than four inches in length by eight feet, the width of the window.

The work of so reconstructing said window could be done without seriously interfering with the comfort of occupants of the house and in such a way as that, within a couple of months, no one, not an expert in such matters, could tell that the original plan or design had not been carried out in every way or that the said bay window as so rebuilt had not been erected with the rest of the house.

(Signed) ANDREW MURRAY.

Subscribed and sworn to before me this 23d day of October, A. D. 1912.

JNO. P. McMAHON,
Notary Public.

DISTRICT OF COLUMBIA, *sct:*

Before me, the undersigned, a notary public in and for the District of Columbia, personally appeared James P. Parry, who, being first duly sworn according to law, deposes and says: I am an assistant to the inspector of buildings for the District of Columbia and have been so engaged for the past eight years. In the fall of the year 1905, in the course of my official duties, I had occasion to examine the plans of a dwelling-house, the erection of which was commenced about that time on a permit issued to Lewis E. Smoot. The house is on the north side of Wyoming avenue and is No. 2007.

I am familiar with the plan of construction of the bay window built in connection with the west wall of that house. This window is eight feet wide and one story (about twelve feet) high, and I understood that the back of this window projects six and one-half inches over the land of the owner next adjoining on the west. The "splay" walls of the said bay window, that is, the walls which Thomas J. D. Fuller, the architect, calls in his affidavit (R. p. 47) the "north and south walls of the projection," are about four feet eight inches in length.

If so much of the back wall of this bay window as projects over the adjoining owner's land be removed and rebuilt on the party line it would leave these splay walls a little more than four feet each in length. This would be sufficient space for windows two feet four inches wide, or for what is known as "stock size" windows.

After so removing a portion of the back wall of the bay window it would be necessary to strengthen what is left of such back wall. But as this wall is only one story high and carries no weight, except the roof, a reinforced wall four inches thick built on the inside of the present wall would be amply sufficient.

This reinforcement will also apply to the foundation of the window.

To reinforce the back wall of the bay window by the inside wall four inches thick would leave ample pier space for support, in fact practically the same as now exists, and would not affect the architectural features of the building.

If more space be needed or desired, it can be accomplished by the construction of a square or right-angle bay window put in the place of the present hexagonal construction. This would give approximately sixteen feet additional space in the library and billiard-room, and the entire cost for such a structure, including all proper expenses incidental to the removal of so much of the present bay window as projects over the party line, would not be more than $1,500.

If the work necessary to make the changes above suggested be properly done the changes would hardly be noticeable, especially as the house is built forty feet back from the street and the bay window nearly four feet back of the front wall of the house.

In my opinion this bay window can be taken down and rebuilt for less than the amount specified above.

JAMES P. PARRY.

Subscribed and sworn to before me this 23d day of October, A. D. 1912.

JOHN P. McMAHON,
Notary Public.

DISTRICT OF COLUMBIA, *sct:*

Before me, the undersigned, a notary public in and for the District of Columbia, personally appeared in said District Ferd T. Schneider, who, being first duly sworn according to law, deposes and says:

I am an architect by profession and have been engaged in the active practice of my profession, principally in the District of Columbia, for the past twenty years and more. In that time I have planned and superintended the construction of many large houses in said District, including apartment houses and expensive residences. I have recently examined the bay window built out from the west wall of house No. 2007 Wyoming avenue, in the city of Washington. The window is, approximately, 3 feet 6 inches deep, 8 feet wide and 13 feet high above the grade of the yard. I am familiar with the cost of material and labor necessary in the construction of brick structures, which are higher now than they were in the fall of 1905, when, as I have been told, the house in question was built. In my opinion, the bay window above referred to can be entirely taken out and rebuilt with a diminished depth of 6½ inches, at prevailing prices, at a cost not to exceed $1,400 for the actual work of tearing down and rebuilding, exclusive of interior decorations.

Reducing the depth of the bay windows 6½ inches would narrow the small windows in the sides of the bay windows only about 4 inches. The entire projection could be taken down and rebuilt with the diminished depth of 6½ inches and would leave ample space to use stock window frames, 2 feet 4½ inches in width, in the sides of the bay window on the library floor. The windows in the basement room, which I have been informed is the billiard-room, are what is known as casement sash windows, having each three panes of glass about 8 inches by 10 inches. Apparently the billiard-room is not dependent for light on these small windows and the reduction in the size of the glass consequent upon lessening the depth of the bay window would make little difference, either for lighting or ventilating purposes.

Besides, in rebuilding the bay window, it not being intended for use as a party wall, under existing building regulations, it would be necessary only to carry the 13-inch wall from the foundation to the first-floor joists and 9 inches from that point to the top of the window. This would reduce the depth of the bay window in the billiard-room 6½ inches and in the library room but 4½ inches.

Two months would be ample time in which to tear down and rebuild the bay window of the proposed new dimensions. The removal of the window would not materially affect the occupancy of the main building in any way, as a stud partition, covered with good building felt and then sealed with tongue and groove stuff, could be placed in the opening so as to protect the rooms against the elements and reduce to a minimum annoyance from dust during bricklaying operations. If light be necessary in the library while the work is in progress a window could be set in the temporary stud partition at a very small expense.

A reduction of 6½ inches in the depth of the bay window will not materially affect the appearance of the building, for if the work is well and properly done it would not give a patched and altered appearance to the house and no one not an expert could tell after six months or less that the entire building had not been erected, window and all, at the same time.

The use of the billiard-room would not be impaired to any appreciable extent by lessening the depth of the bay window 6½ inches, for there is no position in which a billiard table could be placed in the basement or billiard-room as now constructed where the side walls of the bay window would not interfere more with the use of a cue than the back wall of the window if and when reduced as aforesaid.

The deck space on top of the bay window as now built is of no practical use, for it is too narrow as constructed to seat two people comfortably, and a reduction of that space 4½ inches by 8 feet could make no material difference in the value of the house, or, if any, it would be very slight. If the owners of the lot next adjoining on the west were to make use of the back of the bay window as a party wall, for a house equal in size to said house No. 2007 Wyoming avenue, the deck space of the bay window would be still further reduced, and it would then become worse than useless if not a positive nuisance.

FERD T. SCHNEIDER.

Subscribed and sworn to before me this 25th day of October, A. D. 1912.

JOHN P. McMAHON,
Notary Public.

Supreme Court, U. S.
FILED.
DEC 10 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 85.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL AND OTHERS.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEES ON THE MERITS.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
BARRY MOHUN,
Attorneys for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 85.

LEWIS E. SMOOT, APPELLANT,

vs.

JULIA TURNER HEYL AND OTHERS.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEES ON THE MERITS.

Statement of the Case.

The appellees, all infants when the bill was filed, are the owners of a large and valuable lot of land fronting sixty-two feet on the north side of Wyoming avenue, and outside the limits of the city of Washington. They inherited the property from their mother, who had erected a dwelling house thereon in 1900, colonial in design, with a frontage of thirty feet, setting back thirty-five feet from the building line of the lot, and eighteen inches inside the west line. This left a side yard on the east about thirty feet wide. Around the entire lot there was a privet hedge, planted shortly after the

completion of the house, three or four feet in height and highly ornamental. This hedge was nine inches inside of the east and west boundary lines of appellees' lot. Other properties on the street were similarly ornamented with such hedges, and none of the houses in the block were built on the lot lines, and, of course, none with party walls.

Appellant owned the lot next adjoining on the east, fifty feet wide, also fronting on Wyoming avenue. When the bill was filed he was proceeding to erect thereon a dwelling house set back fifteen feet from the street, the west wall being within his own west line, which was also the eastern boundary line of the appellees' lot. This wall was forty feet long and three stories high. Five feet back from the front of the house a bay window was projected, the foundation for which was extended eleven inches over the dividing line, while the main part of the back wall of the window extended over the line about six inches. The window is eight feet wide and one story high (R., 12-13).

The ends of the back wall of the bay window were on a "splay," as it is called, which would greatly increase the cost of a wall to be connected with it. The additional expense would amount to about as much as the value of the wall of the dimensions of the bay window (Mr. Ashford's deposition, R., 22).

Some controversy arose between the appellant and the District inspector of buildings about the issuance of a permit, which eventuated in a suit for mandamus by appellant against the acting inspector of buildings. In his petition for the writ the appellant prayed that the inspector of buildings might be directed to enter upon the land and lay out the line of the west wall of the proposed building. The assistant inspector of buildings, represented by the Corporation Counsel, answered the petition and denied the petitioner's right to the writ as prayed. In his answer the acting inspector averred that the owners of the adjoining lands (appellees here) objected to having the bay window built as planned and submitted that the District authorities ought not to be required

to decide between conflicting owners. Appended to the answer is the application made by appellant for permit to build, in which he states that there is to be no projection beyond his own line and no party wall. Also appended to the answer and made part of it was a letter from appellees' counsel stating that they objected to the proposed bay window and would treat as a trespasser any person who entered on their land for the purpose either of laying out the lines or building the proposed bay window. Smoot, the appellant here, demurred to the answer, and the case was set down for hearing on demurrer, but for some reason which did not appear counsel for the parties entered into a stipulation for discontinuing the cause. There was no final decree on the demurrer.

Thereupon, without further notice to the appellees and during their absence from the city, the appellant entered upon their land, cut down the hedge, which was nine inches inside of their line, and proceeded with the erection of the bay window projecting over appellees' line from six to eleven inches.

Before the window was completed the bill in this cause was filed praying that the appellant might be restrained from further proceeding with its erection and forthwith remove so much of the window as projected over appellees' land.

Appellant, defendant below, answered the bill. On this answer issues were joined and proofs taken. Meanwhile appellant had completed the erection of the bay window.

On final hearing in the Supreme Court of the District of Columbia a decree was entered directing the removal of so much of the bay window as projected over appellees' lot. From this decree appellant took an appeal to the Court of Appeals where the decree was affirmed. From this judgment of the Court of Appeals the appellant brings the present appeal to this court.

ARGUMENT.

I.

The back of the bay window built by appellant, partly on appellees' land, which forms no part of the main wall of appellant's house and which can never be of any possible benefit or advantage to appellees, is in no sense a party wall.

The central idea—the true, comprehensive, and undivided meaning of the term "party wall" is mutuality of benefit.

Sharp *vs.* Cheatham, 5 W. Va., 673.

> "A party wall is intended, in the first place, to serve for the support, at any point, of the beams which the servient owner may reasonably have occasion to insert in a supporting wall. This forbids the construction of openings where beams cannot be inserted and support cannot be afforded. In the next place it is intended to serve the purpose of a complete division between adjoining houses. This forbids the construction of spaces in it which do not divide."
>
> Corcoran *vs.* Nailor, 6 Mackey, 580.

A fortiori must it forbid the erection of chimneys, bay windows, or projections of that sort which do not serve as a "complete division between adjoining houses."

This bay window, as constructed, can never be of any benefit whatever to the appellees' lot. It is twelve or fifteen feet back from the street, one story high and eight feet wide. The ends of the wall are not at right angles to the north and south walls of the building, but are on a "splay," as it is technically called. So to erect a new wall, with the north and south ends connected with the north and south ends of the back wall of the bay window, would cost as much or more than an entirely new wall of the same dimensions as the back of the bay window.

The rear wall of the bay window, detached as it is from the main wall of the building, could be of no use to owners of adjoining land should it happen that they might want to erect any sort of a building on their property. It would have been quite as appropriate for the appellant to build a tower on the west of his dwelling house, two or three feet square and entirely disconnected from any other structure, and to claim a right to extend it thirteen inches over appellees' land.

As was said in

Corcoran *vs.* Nailor, 6 Mackey, 580,

> "A party wall must be so constructed as that the owner of the servient land may use it as such."

Here the back of the bay window does not constitute any essential part of the appellant's building proper. It is a mere appendage.

The main west wall of appellant's house is less than three feet inside of his west boundary line. This wall is about forty feet long and possibly thirty feet high. Suppose appellees were to build a house, with a party wall, on their own land of similar or greater dimensions than the west wall of appellant's house. What would result? A strip of appellant's land less than three feet wide, shut off from light and air, and a little bay window tucked in between of no possible use. So manifestly when the appellant designed his house he assumed that appellees would not build on their vacant lot; or, at least, if they did they would build as all other owners in the block had done—inside of their own lot lines. He could never have supposed that in building his bay window he was building a wall that could or would ever be used by his neighbor as a party wall.

II.

There is no provision of law to authorize the building of party walls outside of the limits of Washington City as a right appurtenant to the ownership of land.

The right to erect party walls in the District of Columbia is confined to the limits of the Federal City and may be said to rest in agreement as a covenant running with the land. The Maryland farmers, original proprietors of lands selected as the site for a Federal city, in making conveyances of them to commissioners appointed to lay out the city, provided that the lands so conveyed should be subject to "such terms and conditions as shall be thought reasonable by the President for the time being for regulating the materials and manner of the buildings and improvements on the lots generally inside of the city, or any particular streets or parts thereof, for common convenience, safety or order; provided such terms and conditions are declared before the sale of any lots."

Under and by virtue of this grant of power, President Washington, on the 17th day of October, 1791, and before any of the lots conveyed to the Commissioners were sold or reconveyed, promulgated certain building regulations. One of these is in the following terms:

> "That the person or persons appointed by the Commissioners to superintend the buildings may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall. The charge or value thereof to be set by the persons so appointed by the Commissioners."

Thereupon all lands lying within the limits of the Federal City became and were subject to this regulation, and so continue to the present time.

The whole subject of party walls in the District of Columbia was learnedly and exhaustively reviewed by the late Justice Cox in

Fowler vs. Saks, 18 D. C., 570.

The property in controvery in this case was on Seventh street west, near D street north, in what may be said to be the heart of the Federal City.

In the course of his opinion Judge Cox says (p. 578):

> "What we understand now by a party wall had no existence at common law, except by convention between conterminous proprietors. A man had no right to enter upon and occupy a part of his neighbor's land for his own convenience or for any purpose whatever without his consent. The privilege or easement, as we call it, giving to a builder the right of erecting a division wall between himself and his neighbor, partly upon his neighbor's land is therefore purely the creature of legislation."

Later along in the opinion, after quoting at length the promulgation of President Washington, Judge Cox adds:

> **"This building regulation, so authorized, is the foundation and only source of right claimed by any one here to locate his party wall one-half on his neighbor's land."**

This decision was rendered in March, 1890, and has never since been questioned in the appellate courts of the District.

In some of the States provision for party walls is made by statute and such statutes are held not to be obnoxious to the contention that they deprive the owner of the servient land of his property without due process of law.

Swift *vs.* Calnan, 102 Iowa, 206.
Evans *vs.* Jayne, 23 Pa. St., 34.
Brooks *vs.* Curtis, 50 N. Y., 639.

But the decisions are not uniform and the right has been vigorously assailed on constitutional grounds.

> "The police power of the legislature does not justify it in authorizing one man to appropriate and use the property of another without his consent and without adequate compensation."
>
> Wilkins *vs.* Jewett, 139 Mass., 29.

See also Traute *vs.* White, 46 N. J. Eq., 437.

In the absence of legislative authority municipalities are without power to require or authorize the erection of party walls. This proposition is clearly enunciated and decided in Schmidt *vs.* Lewis, 63 N. J. Eq., 566 (decided in 1902).

This was a suit to enjoin the erection of a party wall in Camden, partly on the land of complainant.

The injunction prayed for was granted on the ground that there was no legislative authorization for such structures. The court found that an ordinance of the city of June 6, 1870, recognized the right to erect party walls, and said, Reed, V. C., speaking for the court (p. 567):

> "At the time of the passage of that ordinance, and at the time of the decision of the case in *Hunt vs. Ambruster, supra,* the charter of Camden, in its 18th section, provided that it should be lawful for the city council to pass ordinances, *inter alia,* for authorizing the erection and building of partition or party walls and fences. This language, however, seems to be absent from the present revised charter of the city of Camden, approved Feb'y 14, 1871. The only provision in the present charter respecting the matter of party walls is to be found in the 35th section, which confers upon the common council the right to prescribe the character and stability of all buildings to be hereafter erected, to direct the depth of the foundation, thickness and materials used in the construction of the walls thereof and regulate all such other matters as shall be deemed necessary to be observed in the construction of buildings to protect

and insure the health and safety of the citizens: *Provided,* That no party wall shall be less than nine inches in thickness.

"It is perceived that this section contains no authority, by ordinance, to impose a servitude by one owner upon the land of his neighbor, but only provides for a police regulation in respect to the walls that may be built, by agreement or otherwise, as party walls."

Complainant had previously built a wall, in the nature of a party wall, on defendant's land, that the latter had used. This held not to estop him from denying the right of defendant to build on his land.

"By building his house as he did, he undoubtedly gave the right to the adjoining owner to use the one-half of his wall, but he gave him no right to trespass on any other portion of his lot."

In the District of Columbia, as was pointed out by Mr. Justice Cox in Saks *vs.* Fowler, *supra,* the only *source of right* claimed by any one here to locate his party wall one-half on his neighbor's land is the promulgation of President Washington. But the authority to make this promulgation was confined to lands which had been conveyed to certain commissioners charged with the duty of laying out a Federal City. He had no more authority to establish regulations of any sort for lands outside the limits of the Federal City, which were still, notwithstanding the Act of Session, in the exclusive ownership of individuals, than he had to perform a similar function for the State of Maryland or what was later known as the Northwest Territory.

It was contended below, however, that the act of Congress approved June 14, 1878, conferred upon the Commissioners power to extend President Washington's promulgation so as to include the entire District.

The act is very short and is as follows:

"CHAP. 194. *An act to authorize the Commissioners of the District of Columbia to make and enforce regulations for the sale of coal; and also building regulations*" (20 Statutes at Large, 131).

"That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to make and enforce such rules and regulations relative to the sale of coal in the District of Columbia as shall insure full weight to the purchasers of coal; and all such building regulations for said District as they may deem advisable."

Manifestly this act was intended only to empower the Commissioners to regulate or fix the character of the materials used and the size and form of proposed structures. In other words, it was regulation pure and simple. It did not confer upon the Commissioners authority, as did the promulgation of President Washington, to "enter on the land of any person, to set out the foundation and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of persons between whom such party walls are to be built."

The act could not be held to include the power to condemn the property of one person for the benefit of another in a manner in which the general public can have no interest whatever, whether with or without compensation. The Commissioners are without power even to condemn land for public purposes, and special legislation must be had before a street can be extended or even widened. This is a power Congress has very carefully reserved to itself, assuming that Congress has the power to thus deprive a citizen of his property.

It cannot be successfully contended that the Congress intended to vest the Commissioners with such extensive power over the property of individuals, in which the public has no concern, by an act whose primary purpose was to regulate the sale of coal.

In Saks *vs.* Fowler, *supra*, the scope of the act of June 14, 1878, was considered by Justice Cox as intended to authorize the Commissioners to regulate the size and character of structures, and the materials to be used, and make rules for determining the degree of responsibility which attaches to a building owner in respect of the removal of old walls and the building of party walls in their stead. It confers no right whatever in the matter of the location of such walls. That is a question of private right attaching to the ownership of all lands within the limits of the Federal City under "the covenant running with" such lands.

It cannot escape notice that in making and promulgating building regulations under authority of the act of June 14, 1878, the Commissioners did not assume jurisdiction or control over the *location* of party walls, but prescribed only how such walls should be built as to material, character, height, thickness, etc. This is clearly shown in what might be called the preamble to section 62 of the building regulations now in force, found on page 1 of the appendix to appellant's brief, as follows:

> "SEC. 62. The fourth section of the Building Regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force, and is published for the information of builders. The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between the parties."

As has been pointed out, the building regulations of President Washington concerned only lands within the limits of the Federal City, and the act of June 14, 1878, did not give them any extra-territorial application.

The effect of the act of June 14, 1878, was considered by the justice holding the special term of the Supreme Court of the District of Columbia after the case had been submitted on final hearing.

He reached the conclusion, tersely and cogently stated, that (R., pp. 36, 7):

> "The 'regulation' by appropriate authority of the exercise of a right already existing is quite different from depriving the property owner of a vested right and revesting that right in another property owner, and this latter Congress has not seen fit to authorize or to provide for; by the use of the word 'regulation' in the act referred to Congress has done no more than authorize the Commissioners to throw round the general right of property owners to erect a building, such limitations as the public safety and general welfare may require. Congress has not created and has not undertaken to authorize the Commissioners to create a procedure competent to deprive a property owner of the use of part of his property and give that interest to his neighbor."

The questions of law involved in this appeal are thoroughly and exhaustively considered in—

Traute *vs.* White, 46 N. J. Eq., 437.

The Vice-Chancellor, in delivering the opinion of the court in that case, says at page 440:

> "And I think it proper to say further, that, but for the express dictum of Chancellor Green, in Hunt *vs.* Ambruster, 2 C. E. Gr., 208, I should have thought an act or ordinance authorizing a party to build a wall on his neighbor's land to be simply not legislation, but usurpation. I confess it is not forbidden by any clause in the Constitution, and I have always supposed it was not thought to be necessary by the framers of that instrument to insert in it a clause forbidding the taking of private property for *private* use, either with or without compensation, and that legislation in that direction was, in the absence of express constitutional authority, beyond the law-making power. And it seems to me, that where my neighbor takes exclusive possession and occupation of my land by covering it with a solid wall of masonry, many feet high, he *'takes'* it from me in the most thorough and effective manner, although the legal title remains in me. I do not understand that the legal title is at all involved in

an unlawful *'taking'* of land, but that it is a question rather of practical dominion over, and the right to use it at the owner's free will and pleasure, so that he do not injure his neighbor or the public. When and so far as the owner is prevented from exercising such dominion over his land, it is *'taken'* from him. Nor do I understand such taking can be authorized by any supposed benefit to result to the owner. Especially is this true, in the case of a party wall, where the realization of the supposed benefit depends entirely upon the manner in which the owner to be benefited may desire to enjoy his lot. If he shall never desire to build on that part of his lot, a party wall will never be of any benefit to him; or even if he shall desire to build up to his line, the party wall may be entirely unsuited in thickness and material for the structure he proposes to erect, and so be a positive injury rather than benefit to him.

"There is a clear distinction and no necessary connection between legislative regulation of the *size* and *character* of the walls of buildings in crowded cities, and legislative authority to one man to build a wall on his neighbor's land with the view of conferring a benefit upon him. The former is justifiable and proper as a police regulation, to prevent the spread of fire, and to guard against the danger of falling buildings, and that, I understand, the history of the legislation in regard to party walls shows to be its origin.

"But the question whether or not two adjoining owners shall erect and own and enjoy a wall in common between them or shall each erect his own wall on his own land and enjoy it as he does his other property, concerns those adjoining owners only, and in it the public has no interest whatever.

"Legislation, regulating and authorizing party walls, was had in Pennsylvania as early as 1721 and became imbedded in its colonial system, and was a part of it when it became a State and adopted a written constitution, and, on this ground, it may be that such legislation can be justified in that State. Upon similar grounds legislation authorizing the compulsory drainage of meadows is justified in New Jersey

(cases cited). But an examination of these authorities, especially the opinion of Chief Justice Beasley in 12 Vr., shows that but for the sanction of ancient usage that sort of legislation could not be supported. At pp. 177-8, he says: 'The position assumed was, that the legislature could not authorize this kind of improvement to be made at the expense, in part, of a land-owner who did not agree to the enterprise. If the law in question were defensible alone on the ground that it is an emanation of the legislative power in its ordinary exercise, I should be constrained to yield my assent to this contention. There is nothing that I know of in the nature of legislation that could stand as a warrant for such an enactment. To make this evident, all we have to do is to realize fully the character of the authority thus assumed. The purpose of the law is to enable one set of land-owners to compel another set to co-operate, against their will, to drain that body of meadow-land in which they have separate interests. The persons thus coerced manifestly suffer an invasion of their ordinary proprietary rights. Why should they thus be forced either to improve their own land or help to improve the land of others?

"Nor is such an exercise of power any more justifiable, if it is to be derived merely from the nature of the legislative authority, than would be an enactment (mark the language) *commanding A and B to farm their several lands at their joint expense.* And yet no one will pretend that this can be done. Under a constitution that guarantees the inviolability of private property, and limits the law-making power to the function of legislation, it appears to me entirely inadmissible to claim that it is a legitimate use of the prerogative to legislate, to enact a law, such as the present one, requiring a few land-owners to improve their lands for their own profit, and at their own expense. I regard it as a clear infringement of the Constitution, to take, by force of a statute, the money of a person from him, even though such money should, against his will, be used for his private benefit, in the improvement of his land. Such an act has nothing in common with

respect to legal principles, with the condemnation of property for the uses of the community, and to the charging, to a limited extent, of the costs of such improvement upon the land-owners specially benefited. I cannot assent to the hypothesis, that this law can rest on the State's right to tax, or on its eminent domain.

"This reasoning seems to me to include party walls and in effect to overrule Hunt *vs.* Ambruster; and see Scudder *vs.* Trenton Delaware Falls Co., Sax., 694, 726, and Coster *vs.* Tide Water Co., 3 C. E. Gr., 54; S. C., on appeal 3 C. E. Gr., 518. I have said so much, as a protest simply, against the doctrine of Hunt *vs.* Ambruster."

Appellant had ample notice before entering upon appellees' land that they objected to the building of the proposed party wall and that they would treat as a trespasser any one so entering upon their land for the purpose of either laying out or building the proposed bay window, but he preferred to appropriate some of his neighbor's land for his bay window and locate the main walls of his building, both on the east and west, within his own lines. If in consequence he suffers inconvenience and loss, he has no one to blame but himself.

Corcoran vs. Nailor, supra, was a suit for mandatory injunction. Nailor built a party wall between his land and Corcoran's in which were left openings for windows. Corcoran protested and objected to these openings at the time of their construction. He complained that the openings so weakened the wall as to render it unfit for a party wall. The bill prayed that the court would by its mandatory injunction enjoin the defendant from continuing the windows in the party wall.

The injunction was issued as prayed. It being contended that Corcoran had lost his right to the relief prayed by laches, the court said:

"He protested in good season against the defendant's proceeding."

The State of Pa. *vs.* The Wheeling, &c., Bridge Co., 13 Howard, 518:

In this case the State of Pennsylvania exhibited its bill in the Supreme Court as a court of original jurisdiction, charging that the Bridge Company was engaged in the construction of a bridge across the Ohio River at Wheeling which would obstruct the passage of steamboats to and from ports of Pennsylvania, and thereby lessen the tolls which that State reasonably expected from certain canals and railways it had constructed at great expense. The State prayed an injunction against the erection of the bridge as a public nuisance.

In August, 1849, a supplemental bill was filed stating that after notice the defendants had continued to prosecute the work by laying certain cables which obstructed navigation and as against these an injunction was prayed.

In December, 1849, another supplemental bill was filed representing that the bridge had been completed, and that it greatly obstructed the navigation of the river. It prayed the abatement of the bridge as a nuisance.

After commenting at length on the facts of the case the court says (p. 578):

> "The Bridge Company had legal notice of the institution of the suit and of an application for an injunction to stay their proceedings, before their cables were thrown across the river. This should have induced them to suspend, for a time, their great work, alike creditable to the enterprise of their citizens, and the genius and science of the engineer who planned the bridge and superintended its construction. It is a matter of regret that by the prosecution and completion of the bridge they have incurred a high responsibility.
>
> "For the reasons and facts stated, we think that the bridge obstructs the navigation of the Ohio, and that the State of Pennsylvania has been, and will be injured in her public works in such manner as not only to authorize the bringing of this suit, but to entitle her to the relief prayed."

After suggesting that the obstruction to navigation might be removed by elevating the bridge, the court adds:

> "If this or some other plan shall not be adopted which shall relieve the navigation from obstruction, on or before the first day of February next, the bridge must be abated.' "

In support of his contention counsel for appellant cites cases from four States, in all of which there is direct statutory authority for erecting "party walls."

In Iowa it is provided that "he who is about to build contiguous to the land of his neighbor * * * may, if there be no wall on the line between them, * * * rest one-half of the same on his neighbor's land."

Swift *vs.* Calnan, 102 Iowa, 211.

But in this case the constitutionality of such a law was seriously questioned.

In New Jersey the law provides "that any party erecting a building within the city of Camden may construct the outer foundation walls thereof equally on his own land and on the land of the adjoining proprietor."

Hunt *vs.* Ambruster, 17 N. J. Eq., 211.

This case was seriously questioned in Schmidt *vs.* Lewis and overruled in Traute *vs.* White; *supra.*

In Louisiana the Code section 671, gives the right to the owner who first builds "to rest half his wall on the land of his neighbor."

Carrigan *vs.* De Neufbourg, 3 La. Ann., 441.

In Pennsylvania the right of the legislature to pass acts for the erection of party walls was upheld as not being obnoxious to constitutional guaranties.

Heron *vs.* Houston, 217 Pa. St., 1.

But, as pointed out in Traute *vs.* White, *supra*, "legislation, regulating and authorizing party walls, was had in Pennsylvania as early as 1721 and became imbedded in its colonial system, and was part of it when it became a State and adopted a written constitution, and, on this ground, it may be that such legislation can be justified in that State."

In that State also it has been held that the right to build upon adjoining property may be exercised only where the wall will be for the common benefit of both properties, and not merely for the convenience of the first builder. It was therefore held that no right of encroachment exists in the case of a wall of a back building which would not be of benefit to the adjoining owner.

Rodearmel *vs.* Hutchinson, 2 Pearson, 324.

In this case "R," the first builder, built a house, the front building of which was thirty feet deep, and erected his wall upon the adjoining lot as a party wall; his back building was upon his own land. The adjoining owner proposed to build a house with a front building thirty-six feet deep and the back building of the same depth, taking four and one-half inches for the erection of a party wall of the whole depth of her house.

Held, that the second builder might extend the wall of her front building back as far as proposed, building it as a party wall upon "R's" ground, but must erect the wall of her back building upon her own land.

The *validity* of the act of June 14, 1878, was not questioned in the courts below. The decision at special term was based upon the proposition that that act only authorized "the Commissioners to throw around the general right of property owners to erect a building such limitations as the public safety and general welfare may require (R., p. 37). In this respect which we submit was the purpose of the act, and its only purpose, the authority of the Commissioners is not questioned.

The Court of Appeals based its decision on the ground that "the wall here in question, we think, fills none of the requirements of the regulations. Appellees can derive no such benefit from it as the servient owner is entitled to receive as compensation for the taking and occupation of his land. It constitutes a nuisance rather than a benefit" (R., p. 42).

Section 62 of the Building Regulations as promulgated on March 1, 1902, was first promulgated in 1882, or four years after the passage of the act of June 14, 1878. It has been republished in every subsequent edition of the Building Regulations. As will be noticed, it is merely a republication of the original building regulation promulgated by President Washington on the 7th day of October, 1791, under authority of a *grant* contained in the deeds from the original proprietors of the lands selected for the Federal City. Without such grant, President Washington would have had no power to make any such promulgation binding on land owners in the District of Columbia. As above noticed, this attempted "regulation" was first promulgated by the Commissioners in 1882 and had as much force in 1890 as it has now, no more, no less. The act of June 14, 1878, had then been on the statute books twelve years. And yet Mr. Justice Cox, presumably having before him the last edition of the Building Regulations and the meager act of June 14, 1878, said in the case of Fowler *vs.* Saks, *supra.*

> "This building regulation so authorized (the promulgation of President Washington) is the foundation and the only source of the right claimed by any one here to locate his party wall one-half on his neighbor's land."

For these reasons we respectfully submit that the judgment of the Court of Appeals should be affirmed.

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